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FEDERAL ADVISORY COMMITTEE AMENDMENTS ACT OF 1988

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

OCTOBER 5, 1988

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CONTENTS

Page

Opening statements:
- Senator Glenn 1
- Senator Levin 2
- Senator Pryor 3
- Senator Sasser 4

WITNESSES

OCTOBER 5, 1988

Richard L. Fogel, Assistant Comptroller General, General Government Division, General Accounting Office, accompanied by Greg Ziombra, Project Leader, James Campbell, Group Director, and Jan Montgomery, Office of General Counsel 4

S. Jay Plager, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget 12

Paul T. Weiss, Associate Administrator for Administration, accompanied by James Dean, Director, Committee Management Secretariat, General Services Administration 15

Michael R. Longo III, University Counsel, University of Southern California; Brian C. Murphy, Chairman, Select Committee on FACA, Federal Bar Association; Roberta R. Fede, President, Federal Advisory Committee Management Association; and Eric R. Glitzenstein, Public Citizen Litigation Group 27

ALPHABETICAL LIST OF WITNESSES

Campbell, James: Testimony 4

Dean, James: Testimony 15

Fede, Roberta R.:
- Testimony 27
- Prepared statement 157
- Responses to written questions 165

Fogel, Richard L.:
- Testimony 4
- Prepared statement of Rosslyn S. Kleeman, Senior Associate Director, General Government Division, GAO 75
- Responses to written questions 95

Glitzenstein, Eric R.:
- Testimony 27
- Prepared statement 171
- Responses to written questions 186

Longo, Michael, III:
- Testimony 27
- Prepared statement with an attachment 124

Montgomery, Jan: Testimony 4

Murphy, Brian C.:
- Testimony 27
- Prepared statement 147
- Responses to written questions 153

Plager, S. Jay:
- Testimony 12
- Prepared statement 103

Weiss, Paul T.:
- Testimony 15

Page

Weiss, Paul T.—Continued
    Prepared statement with attachments 112
Ziombra, Greg: Testimony 4

APPENDIX

Text of S. 2721 45
Prepared statements of witnesses in order of appearance 75
Statements of:
    Center for Auto Safety 208
    Alex Naimon, attorney at law, with an attachment 213
"Federal Advisory Committee Act: General Services Administration's Management of Advisory Committee Activities," General Accounting Office, October 1988 235

FEDERAL ADVISORY COMMITTEE AMENDMENTS ACT OF 1988

WEDNESDAY, OCTOBER 5, 1988

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn (Chairman of the Committee) presiding.

Present: Senators Glenn and Levin.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman Glenn. The hearing will be in order.

Good morning and welcome to our third hearing on the Federal Advisory Committee Act, or FACA. Today we will be discussing Senate Bill 2721, the Federal Advisory Committee Act Amendments of 1988, as well as the results of a study conducted by the General Accounting Office on the Committee Management Secretariat located in the General Services Administration, GSA.

FACA was enacted 16 years ago this month to provide a means for the Federal Government to account for and manage advisory committees. FACA and the advisory committee system it created have for the most part worked quite well in providing the Federal Government with advice in an accountable and efficient manner, but problems in interpreting and implementing the Act have surfaced repeatedly over the years.

I might add that we were concerned about some of this not long after I first came on this Committee 12 or 13 years ago. We took action to try and cut down the total number of committees, boards and councils advising the Government. We identified some 1,600 advisory boards, committees, councils that had been created and never went out of existence. We were able to eliminate some 400 of those committees with large savings. So this Committee has had an ongoing history of concern about advisory committees—how they operate and how they are controlled—to make sure that they do not run out of control.

During this past year the Governmental Affairs Committee has held two hearings where we have learned a great deal about the Federal Advisory Committee Act from the civil servants who administer it in the agencies, the public interest groups who file lawsuits to enforce it in the courts, and other interested parties. These witnesses from the FACA community raised concerns about problem areas in the Act, including requirements for balanced membership, open meetings, availability of documents, coverage of subcommittees, and the proliferation of statutorily mandated advisory committees.

While there has been general consensus on what the problem areas are, it seems that there are as many proposed solutions as there are commentators. We attempted to address these concerns in S. 2721, which Senator Levin and I introduced. I am pleased to say that it has five other cosponsors from this Committee, and we are looking forward to hearing reactions to the bill from our witnesses today.

We will also be hearing testimony this morning from GAO regarding the General Services Administration's Committee Management Secretariat. The Secretariat is responsible for government-wide administration and enforcement of the Act. GAO has found that GSA has not carried out many of its statutory responsibilities, including ensuring that advisory committees are, first, properly established, that each committee was reviewed annually, and that reports on Presidential advisory committees' recommendations were prepared for Congress.

For example, as part of its study, GAO reviewed 114 proposed charters and justification letters submitted to GSA by agency heads and found that 46 percent of these documents were missing items required by the Act or the regulations that GSA follows pursuant to that Act. However, GSA approved the establishment of all 114 committees without even asking agencies to supply the missing information.

I find it very troubling that the agency charged with government-wide enforcement of the Act is neither enforcing the law nor following its own regulations. Every effort must be made by top-level management at GSA to see that this situation is corrected.

Carl Levin, who has been interested in this particular issue and has done a lot of work on it, has another conflicting meeting this morning, but he asked that his statement be included in the record. I am glad to do that, so his statement will be included in the record at this point.

Senators Pryor and Sasser were unable to be with us this morning and have statements to follow that of Senator Levin's.

[The prepared statements of Senators Levin, Pryor, and Sasser follow:]

Opening Statement of Senator Levin

During the 100th Congress, a continuing concern of the Government Affairs Committee has been federal advisory committees. In December of last year the Committee held a hearing on the operations of a particular advisory committee, the AIDS Commission, and explored issues of committee compliance with the Federal Advisory Committee Act or "FACA." In April 1988 the Committee held a hearing in which it examined a particular department, the Department of Defense, on issues of agency compliance with FACA. Today, the Committee completes its survey by examining the Committee Management Secretariat in the General Services Administration which oversees the establishment, operation and termination of all advisory committees throughout the federal government.

The activities of the Committee Management Secretariat are key to the proper functioning of FACA and to committee and agency compliance with its rules. A Secretariat which is reticent in its oversight obligations will be unable to compel compliance with the law. A Secretariat which is focused on bureaucratic concerns will not find the time it needs for meaningful oversight. The GSA Secretariat has suffered from both these problems, in failing to provide the strong oversight envisioned under FACA. This hearing is an appropriate forum for reminding the Secretariat of its statutory obligations, discussing problems and pitfalls, and instructing the Secretariat to re-invigorate its oversight activities.

In addition to examining the Secretariat, the Committee will be considering legislation, S. 2721, which Senator Glenn and I introduced earlier this year to improve FACA. FACA requires advisory committees to be balanced, fair, open and free from inappropriate influences. It is the key statute that governs the functioning of federal advisory committees, and it has gone a long way towards giving us a handle on all the groups that advise the federal government. At the same time, like most laws, there is room for improvement.

S. 2721 attempts to provide the improvements FACA needs. Responding to problems uncovered in our hearings and elsewhere, the bill resolves questions of statutory interpretation, plugs loopholes, and clarifies and strengthens many FACA provisions. One key area of change involves new provisions to handle conflict of interest and ethics concerns; those are provisions which I hope will be addressed today. While S. 2721 will not be enacted during this session, it will serve as a starting point for legislation next year. It is my hope that the witnesses here today will provide commentary and suggestions for our next effort.

I commend Senator Glenn for his persistence and thoroughness on this subject. Advisory committees, whether they are called commissions, committees, councils, groups, boards, or some other appellation, are ubiquitous. It is important that we keep track of them to ensure that they are operating fairly and openly, with proper attention to the public treasury. This hearing contributes directly to that effort and, again, I salute Senator Glenn for holding it.

OPENING STATEMENT OF SENATOR PRYOR

Mr. Chairman, I want to commend you for holding this hearing on S. 2721, a bill that will strengthen the Federal Advisory Committee Act. I am a cosponsor of this bill and want to work with you as you move forward on this issue.

I also want to commend Senator Levin for his involvement on this issue. I have worked closely with Senator Levin on another area in which people provide advice to the government and I am pleased to be able to report that we achieved some success in our endeavors.

This hearing focuses on Federal Advisory Committees and we will hear a number of witnesses comment on S. 2721. Mr. Chairman, I want to briefly highlight one issue I believe is critical whenever private individuals are advising the government. The issue is disclosure. What personal financial holdings or what business relationships do these people have that create potential conflicts of interests?

For example, it is important that we know what financial interests the members of the Defense Science Board have in the defense industry.

I am glad that S. 2721 will strengthen the existing disclosure requirements of FACA and I am not persuaded by those who might argue that adequate disclosure will unduly burden these experts or perhaps even keep some of them from serving on the advisory committees.

Mr. Chairman, when used properly federal advisory committees provide useful information to key government decision makers. The advisory committees can keep the size of the permanent federal workforce down while ensuring that policymakers receive the best scientific and technical advice available. But, since these committees serve the public interest, it is our duty to make sure that the members of the advisory committees have no potential conflicts that might prevent them from objectively advancing the public interest.

The issue is adequate disclosure. I wish to place into the record an article from the *Washington Post* dated September 30, 1988. The article points to an obvious conflict that might bias the advice the government received. Let me read the first paragraph:

"More than a dozen researchers who conducted major government studies to determine the safety and effectiveness of a new drug for heart attack victims owned stock in the company producing it, raising questions about whether the scientists' financial interest in speeding its approval may have affected the studies or their findings."

Potential conflicts like this are all too common, even in the scientific community. The article quotes from one official who states, "Seeking a profit from your research is the ordinary, expected thing."

Mr. Chairman, it may be ordinary and expected, but private individuals should not profit at the expense of the public interest.

The article goes on to point out, in a matter directly related to this hearing, when a board of experts set up by the National Institute of Health to monitor this research raised some questions, NIH dismissed the board and appointed a new one. Hopefully with the passage of S. 2721, agencies will not be able to summarily dismiss advisory committees without the dismissal promptly becoming a matter of the public record.

Again, Mr. Chairman, let me commend you for your efforts on this matter and I look forward to working with you in the next Congress.

OPENING STATEMENT OF SENATOR SASSER

I would like to commend the distinguished chairman for holding today's hearing on S. 2721, the Federal Advisory Committee Amendments Act of 1988.

Mr. Chairman, this important hearing on the Federal Advisory Committee Act is long overdue. As more and more policy making is delegated to Federal Advisory Committees, it is extremely important that we in the Congress develop appropriate oversight mechanisms to monitor the work of these important committees. I look forward to this hearing as an important first step in ensuring that these advisory commissions do the job that they were appointed to do.

Chairman GLENN. Our first witness this morning was to be Rosslyn Kleeman, Senior Associate Director, General Accounting Office. I understand that she is not able to be with us this morning and so the testimony will be given by Mr. Richard Fogel, Assistant Comptroller General, General Government Division.

Mr. Fogel, if you would introduce your associates you brought with you this morning we would appreciate it.

TESTIMONY OF RICHARD L. FOGEL, ASSISTANT COMPTROLLER GENERAL, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE,[1] ACCOMPANIED BY GREG ZIOMBRA, PROJECT LEADER, JAMES CAMPBELL, GROUP DIRECTOR, AND JAN MONTGOMERY, OFFICE OF GENERAL COUNSEL

Mr. FOGEL. Thank you, Mr. Chairman. On my right is Greg Ziombra, who has been the project leader on this project; Jim Campbell, the group director responsible for this area is to my left; and Jan Montgomery from our Office of General Counsel is most familiar with the specific statutory provisions that we would like to refer to today.

Chairman GLENN. Let me just add first that your testimony, either the complete testimony or an abridged version is welcome. We always welcome shortening the testimony, but we certainly include all of statement in the Committee record.

Mr. FOGEL. Thank you, Mr. Chairman. What I would like to do is just briefly summarize our testimony then.

Mr. Chairman, our testimony this morning is based in part on a report we are issuing today [2] to the Committee on GSA's administration of the Federal Advisory Committee Act and we are pleased again to be able to assist the Committee, as we have in the past on a continuing basis, to look into this area of concern that you noted has been one for many years.

Advisory committees are recognized as being useful for obtaining outside expert advice but they must be properly organized and managed. Everyone agrees that agencies that have them must accept primary responsibility for properly organizing and managing them, but there is a definite responsibility that the President and GSA have.

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[1] See p. 75 for a prepared statement of Rosslyn S. Kleeman.

[2] See p. 235.

The number of advisory committees totaled about 1,400 in 1972 when the Congress passed the Act and it has remained at about 1,000 for the past 10 years. Now, chart 1,[3] which you can see, shows that there are 58 departments and agencies that had advisory committees in 1987; two—HHS and Interior—accounted for about 43 percent of the 992 committees that were in existence during 1987; about two-thirds of the committees were authorized or directed to be established by statute; the remainder, 22 by Presidential order; and at the direction of agency heads, 367.

GSA's responsibilities under the Act generally fall into four categories. The first is to provide guidance to the agencies, and in that regard we would note that it has taken GSA a considerable time to issue its final regulations on this. In fact, it has taken them about 10 years to provide final guidance. Although they did issue some interim regulations in 1983, it was not until 1987 that they issued the final regulations.

Chairman GLENN. I understand that they have made these rules and regulations are now final, right?

Mr. FOGEL. Yes, they have. In addition to that, GSA is to make comprehensive reviews of advisory committee activities, to consult with agencies on their creation, and to prepare the President's annual report.

GSA has consulted with agencies in seeking to establish advisory committees and has prepared the President's annual report, but it has not taken other steps as aggressively as we think it should have to ensure that the agencies properly organize, manage and terminate advisory committees when they should be terminated.

The details of some of these findings are in our report and I would like to summarize them briefly. I would like to let Mr. Ziombra illustrate this with some charts.

Chairman GLENN. Before you put that chart down, just let me ask a question here if I might. You have 268 committees out of Health and Human Services, 157 out of Interior, and then it goes down drastically to all the others. Is there something about Health and Human Services and Interior that led them into something like four or five times the number of committees that other agencies had? Is this the nature of their work? Why such a huge preponderance of FACA Committees in HHS and Interior?

Mr. ZIOMBRA. Well, Health and Human Services has a lot of the medical-related committees. That accounts for a large number. Interior I know has commissions and boards such as grazing advisory boards that also serve to boost that number quite a bit.

Mr. FOGEL. But I know from personal experience looking at HHS that there are an extensive number of advisory committees that deal with health and medical issues and based on our work we think that it is important that they have those types of committees. Obviously, one of the questions is how long do you continue to need them and what is their utility over time.

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[3] The charts shown by GAO start on p. 90.

Chairman GLENN. I do not question them. If they are all valuable, that is fine and we may get a lot of valuable information from having committees like this, that we would otherwise be paying more to get if we had full-time staff doing the same work. But I wondered why there are so few, for instance, in Agriculture compared to Interior and things like that; and VA has a big medical interest, of course. You would think they would have more if Health and Human Services finds it advisable.

Mr. FOGEL. I do not know the detailed answer to that. Again, I could speculate. In terms of, certainly, some of the issues HHS gets into and the scope of their medical research, they may have more.

What our information showed when we did our review is that GSA concurred in the agencies' decisions to establish advisory committees when almost half—about 52 of 114—of the charters and justifying letters were incomplete. The information missing was needed by GSA, we believe, to make an informed decision about compliance with the Act, and this shows some of the things that were missing.

For example, 15 times the agencies' plans for obtaining balanced membership were not specified. The agencies did not specify why the function could not be done somewhere else, or why the committee was essential to agency business in the public interest. And this, perhaps, Senator Glenn, gets at your point of why HHS and Interior had so many committees. If they were going through and trying to justify specifically why these functions were needed, GSA may have been able to make a more informed judgment about what was going on.

GSA also had not made comprehensive reviews but rather had relied on the agencies to report their advisory committee activities. And even when the agencies reported that committees had not met for up to 2 years, GSA did not question this.

For example, agencies reported that 16 committees had not met because they had no agenda items to consider. GSA did not question the continued need for these committees and concurred in continuing them. And again, you can see—not surprisingly—that HHS and Interior had the most number of committees that held no meetings in fiscal year 1987—25 each.

Now, the cost in absolute dollars is not great, but I do not think we can just rely on the fact that the cost in one year are minuscule. It gets to a whole attitude and approach to using your resources as effectively and as efficiently as possible. So, again, that would lead me to question whether, even within the agencies, they are doing enough to look at how they are operating. And certainly we do not think GSA was being as aggressive as it should have been in at least questioning the agencies on these activities, given the findings, for example, that you had 25 committees each that had not met.

Chairman GLENN. Do these committees have staffs of their own that are doing work even though the committee does not meet normally? I would think that a committee meeting would be necessary once in awhile even if they have a staff that is doing work.

Mr. CAMPBELL. Mr. Chairman, typically the support staff are coming from the sponsoring agency. In the case of HHS, that cost is attributable to the agency itself and not, as I understand, to staff assigned to the advisory committee.

Chairman GLENN. Do you have a breakdown on how many of these were formed by statute and were formal because we in Congress asked them to look into an issue as opposed to ones that they just formed on their on?

Mr. CAMPBELL. Overall, about two-thirds of the committees that had not met in 2 years were created by statute—directed to be created by statute—which is consistent with the number of committees overall; about two-thirds.

Chairman GLENN. Did the sunset provision that FACA has apply to these? That unless they are specifically reauthorized they are terminated after a certain length of time?

Mr. CAMPBELL. As I understand, that is a problem area in just how to terminate the committees that were created by statute. The law itself provides that all advisory committees are to terminate in 2 years unless otherwise provided. In the case of those created by statute, I understand there is some confusion as to exactly how to do that. We know that S. 2721 contains a provision to allow agencies to terminate these committees and the Congress can reactivate them within 90 days.

Chairman GLENN. We have a 2-year sunset and some of these had not met for 2 years. Were any of them sunsetted?

Mr. CAMPBELL. I am not sure.

Mr. FOGEL. These particular ones would not have been because they were all either charters or renewals that went over to GSA for reauthorization, so even if they had not met in 2 years someone believed there was a need to continue them.

Now, we would be glad to do some more analysis for you on that. One of the provisions we think—as Mr. Campbell said—in your bill that would help is the one that gives the Secretary, I believe, the authorization to terminate, after advising the Congress, a committee that was established by statute. But that has been an area that has been a problem.

As we also noted in our report, GSA had not prepared or made sure that the agencies prepare reports required on actions taken in response to recommendations by Presidential advisory committees since the early 1980s. The reason for some of this lack of what we would consider to be effective administration of this law by GSA has basically been that it has not been given a real high priority within GSA. GSA has not provided the Committee Management Secretariat with the necessary staff capability to implement FACA, but plans to do so in the future.

For example, GSA has increased its staff from about two people to five since we testified before a Subcommittee of this Committee in 1984. GSA says it now has the staff resources it needs to effectively implement the law. Our feeling is that until GSA has developed a plan and has experience in carrying out these functions, such as making comprehensive reviews, it is a little difficult to make a final judgment as to whether GSA has adequate resources, but certainly five is better than two.

The Committee also asked for our views on whether the function should be located in an agency other than GSA. We do not believe that shifting the function to another agency would necessarily solve the problems we found. Wherever the oversight functions would be located, they will require leadership, management, commitment and support to make sure they are accomplished.

Our detailed statement also notes our comments on the amendments proposed in S. 2721 and we generally support those amendments. In some cases we think that provisions could be strengthened, but overall we think the thrust of that bill is appropriate.

We would be glad to answer any questions.

Chairman GLENN. Good. Thank you very much. I will just follow-up on some of the questions I have already asked here while you were giving your testimony.

In 1984 we had testimony from GAO that, "GSA has been only partially effective in meeting the many statutory responsibilities assigned to it by the Act. For the last several years only two and a fraction full-time professional staff members have been allocated to the committee management function."

Now, as you said, the Committee Management Secretariat staff has now doubled, yet I do not see how that staff can even begin to be effective in carrying out all the things they are supposed to do when you are talking about roughly 1,000 committees. With two people they could not keep the card file on what committees they have let alone see whether all the proper reports and proper justification for the committees are being adhered to, it seems to me.

Did you make any estimate of the size staff you think would be necessary to really carry out the provisions of the Act?

Mr. FOGEL. No, we have not, and I would like to emphasize that we think before you can really make an accurate estimate of the size of the staff that would be needed we would need to be able to look at GSA's plan for how it wants to effectively implement the Act. That is one of the things we recommended to the GSA Administrator that he do in our report that is being issued today.

The plan needs to provide for how they would go about more actively reviewing what was going on, how much time it would take to do that, how much real interaction they would need to have with the agencies. Then everyone would be in a better position to ask the GSA whether it believes it has the appropriate number of people to do the job.

Chairman GLENN. Back to the statutorily created committees: of the figures that we have, say that HHS had 236 committees created pursuant to statute in 1987 of a total of 259 committees; and for Interior, they had 153, and 103 of those were created pursuant to statute, and they had the rest of them formed on their own, I guess.

Is it your opinion that GSA's apparent lack of aggressiveness in enforcing FACA is due to its lack of authority to veto an agency head's decision to create a committee? They cannot tell him, no, you cannot create a committee. Is that part of the problem?

Mr. FOGEL. No. Obviously, if GSA had ultimate decisionmaking authority it might have been a little more aggressive in carrying out its role, but we think the statute was fairly clear on what GSA was supposed to do and we are not necessarily inclined to support having the central agencies in all cases direct the line agencies in Government on what to do. We think it was more a case of GSA apparently, given all the other things it had to do, looking at this and basically giving it not enough attention.

We think the statute was clear enough in terms of how it could have effectively carried out its role, so we do not think the veto issue was a direct cause of GSA's inattention.

Chairman GLENN. We also need GSA acting as sort of a watchdog. We had a case not long ago where under the new SDI, the Strategic Defense Initiative, there were what we for lack of a better term called "rogue committees." They were committees formed sort of willy-nilly across the board. They apparently decided that they needed a little bit of information so they formed a committee, but didn't form it pursuant to the law, to FACA.

Should the Committee Management Secretariat be playing a much more active role in auditing things like that, conducting reviews of non-FACA committees to make sure that we do not get into this rogue committee problem? And do they have the people and the resources to even do that?

Mr. FOGEL. Well, I think that is a second level of concern. The primary concern we would have at this point, Senator, is whether GSA has the willingness and capability to carry out its primary function, which is to enforce the provisions it is supposed to relating to FACA. Then, if we would be satisfied that they were able to do that, I think we would say to take a look at their ability to expand their role.

However, from a theoretical sense, it would be somewhat problematic for GSA to have enough resources to really be able to go into agencies to find a number of committees that were established inconsistent with this criteria. So in the long term we think it would be fairly difficult to be able to look directly to GSA to perform this function adequately.

Chairman GLENN. The Committee Management Secretariat responsibilities were housed at OMB until 1977. What was the track record, as you recall, from back in those days as to how well OMB carried out the functions? And is there any reason to think we should not leave these functions in GSA now? Is there any consideration that maybe OMB would be a better place to house this?

Mr. FOGEL. Well, OMB's track record was not very good, either. We think that it is probably better to leave the function at GSA. In a broader context, we have a lot of questions about how many operational functions you can place in OMB and expect OMB to carry them out effectively. They primarily have to focus on budget development in OMB. To the extent management issues are related to the budget operations, they can be more effective in dealing with them. But we would be opposed at this time to putting this function in OMB.

However, we are concerned in the long run about the relationship among the central agencies and there needs to be better coordination and communication, for example, in this instance, between OMB and GSA. Obviously, GSA has an oversight role to play here regarding the utility of these committees and whether they are useful. One of the ways that you can directly affect whether agencies have these committees is through the budget process, and that function ought to remain in OMB, obviously.

If there was some better communication on this type of issue between the GSA staff working on this and OMB budget examiners, there may be occasions where the budget examiners could raise these types of issues, for example, with HHS or Interior people, in a budget context that might give the agencies more of an incentive to look at whether these committees are really needed.

Chairman GLENN. We have been concerned on this Committee that the requirements for balanced membership be carried out. Balanced membership was put in there very specifically so that we did not wind up with these committees all tilted with whatever the political or ideological bias of the moment was and no matter what administration was in the White House.

Senator Levin and I were both a little concerned about that and we asked GSA to issue supplemental regulations to clarify some of the balanced membership requirements. We will be talking a little about this later on with some of the other witnesses, but did you look at balanced membership? That has been one of the areas that we thought was perhaps more of a problem than anything else.

Mr. CAMPBELL. We did not look at the way any of the agencies attempted to achieve balance in the specific committees; no, sir. We did look at the provisions contained in S. 2721 and we support the provision regarding balanced membership in the bill.

Chairman GLENN. Would you discuss some of your reactions to S. 2721? Do you have any suggested changes to it that you think would make it work better?

Mr. FOGEL. Well, I would be glad to. We support those provisions, for example, that would change the requirement for GSA's comprehensive reviews from each advisory committee from being annual to periodic. Hopefully by making that change GSA can more effectively apply its resources.

Chairman GLENN. Would you put an upper limit on the time also? If you change it from annual to periodic, that could mean once every 5 years. What time frame would you go to?

Mr. CAMPBELL. Mr. Chairman, we are commenting in our formal statement that we believe that GSA should be reporting to Congress, perhaps as part of the President's annual report, on just how many of these reviews are done and also what the results of those reviews are. That comment is based on the fact that they have not done the reviews in the past and now the bill would provide for them to do them only as they choose, or be done periodically.

We think that they should be reporting on what they did.

Mr. FOGEL. I think that one thing the Committee may want to discuss with the Executive Branch on this is the extent to which you would want an upper limit. You could say periodic but not less than 2 or 3 years. Part of the resolution of whether you would put an upper limit in my mind would hinge on the number of resources that you would want to put into it and the types of comprehensive reviews that everyone believes GSA should do.

But the way we came down is by having GSA disclose each year in its annual report what they have actually done as a check to make sure they are doing something on that.

Another area which we think is positive—and this gets to your question, Senator Glenn, about whether the function should reside in GSA or perhaps another agency—has to do with the case where

GSA and the agency may disagree on whether a committee is ~~needed~~, recognizing that the ultimate responsibility resides with the agency. So we support one of the provisions which would allow GSA to make known to the Congress and the public any disagreements it has with an agency by requiring a description of the disagreement in the committee's charter or in the President's annual report to the Congress, if it is a renewal.

One problem that still exists—and we reported on this in 1984—has to do with the definition of advisory committee and the fact that some advisory committees have subcommittees and groups. We felt back then and still feel that it would be worth taking a look at this issue as you develop this legislation. The problem is that you might have a number of subcommittees or subgroups proliferate from the advisory committees and that there is, in a sense, a loophole in the law that only requires that certain provisions apply to the parent committees. So we think that is worth looking at again as this legislation is developed.

Generally, we think the changes you would make in defining meetings and so forth are very appropriate. We have some concern about the amendments dealing with preventing conflicts of interest. Right now the way the bill is drafted, it would require prospective members to file financial disclosure statements before they are appointed or begin service. We assume that means confidential, but we are not sure, and we think that the bill should be clarified to decide whether that is public or confidential.

One of our concerns in this area, too, is the extent to which we want to require extensive financial disclosure statements of private citizens who are serving on advisory committees, and this is an area of a lot of concern to us in GAO. We have looked at ethics problems in Government for a number of years and feel very strongly that people should disclose financial conditions when there is a potential conflict of interest. The dilemma is the extent to which this should be public or private. And also the question which again is not necessarily resolved with a lot of quantitative data is what type of negative effect do extensive financial disclosure requirements have on people's willingness to serve on advisory committees. So we feel that as you develop this legislation further that is an area that you need to explore.

Chairman GLENN. That is a difficult area.

Mr. FOGEL. Yes, it is.

Chairman GLENN. It is one we run into all the time. We make Government service so unattractive for people, and yet we see conflict of interest creeping into things in all sorts of areas that come up numerous times each year. You want leaders of business and industry and banking and unions and everything else under the sun to come in and be willing to take their expertise and apply it to some of our problems and do it on a committee on a volunteer basis, and most of them are happy to do it. And then we make it so onerous by saying, okay, we put every little expenditure, every little interest they ever had in anything under a microscope, and then if it is made public, the press takes it as a conflict of interest and away we go and it looks like some great huge scandal.

I do not know the balance we should strive for on that. We struggle with it all the time here. We do it on our confirmation hearings that come before this Committee all the time. And sometimes we get into things that really are a conflict of interest and once in awhile we have to hold somebody up. Then that just discourages other people from ever even volunteering for fear something that they may not even know of in their background will come out and be an embarrassment to them and their families. That is a balance I do not have any final answer to, I know that. But I think you are very proper in pointing that out as a difficult area. And it is, and we will keep right on struggling with it, I guess.

We appreciate your comments. Thank you. Do any of the rest of you have comments? We let the boss talk all the time here today. Do any of the rest of you have any comments, under pain of getting fired when you get home, I guess. [Laughter.]

Mr. **FOGEL**. No, we do not do that to our people.

Chairman **GLENN**. All right. Don't do that. Thank you very much. We Appreciate it.

Mr. **FOGEL**. Thank you, Mr. Chairman.

Chairman **GLENN**. Our second panel, the Honorable Jay Plager, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget; Mr. Paul T. Weiss, Associate Administrator for Administration, General Services Administration, accompanied by Mr. James Dean, Director, Committee Management Secretariat, General Services Administration. We welcome you to the hearing this morning.

Mr. Plager, we welcome your testimony first, either abridged or in its entirety. In either case, the entire statement will be included in the record.

Welcome again. You are living over here these days. We just had you a couple of days ago.

TESTIMONY OF S. JAY PLAGER, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. **PLAGER**. Yes, sir. We have got to quit meeting like this.

Chairman **GLENN**. No, we do not. [Laughter.]

Mr. **PLAGER**. Thank you, Mr. Chairman. I enjoy coming up here and I am pleased to have the opportunity to address the Committee on this important issue.

With your permission, Mr. Chairman, I would like to summarize what I laid out in more detail in my prepared statement and thus provide greater opportunity for you to ask questions if you wish to about issues that are important to you.

Chairman **GLENN**. Your entire statement will be included in the record.[4]

Mr. **PLAGER**. Thank you for the opportunity to appear and discuss advisory committee matters. These committees provide a unique way for the Government to get good advice.

The Federal Advisory Committee Act has a number of different and potentially conflicting objectives. These include meeting the need of public officials to have access to advice from a fairly balanced membership, allowing broad participation, and limiting administrative burden. On the whole, the Act and the GSA Committee Management Secretariat have contributed positively, in our judgment, to Government decision-making.

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[4] See p. 103.

Committee management has received high-level attention in this Administration. We have made a great deal of progress in assuring that the committees are set up and operated in accordance with the purposes of the Act and on a cost-effective basis. Most recently, GSA issued a revised regulation that streamlined certain procedures and resolved one very important issue, the compensation of committee members. In addition, it is encouraging to see that the authors of S. 2721 have seen fit to incorporate some of the recent recommendations made by the President's Council on Management Improvement in this area.

The Secretariat is fulfilling the role that GSA was delegated under Executive Order 12024. S. 2721 would codify this role, and we agree with that. We believe the current arrangement represents the proper roles for GSA and OMB and would strongly discourage any return of the Secretariat's operational role to OMB.

You asked in your letter about OMB's role in preventing and terminating unnecessary advisory committees, including statutory ones. The primary vehicle available to OMB for this—and we believe an effective one—is the budget process through which we review whether or not an agency has a need for a particular committee.

Let me turn now to some specifics about the proposed bill, S. 2721. As we indicated in our testimony in 1984, we would not oppose a narrow revision of certain parts of the Federal Advisory Committee Act. The bill goes in the right direction in defining the term "meeting." The proposed definition would limit coverage to substantive decision-making meetings of a majority of the members. Together with the definition of "subcommittee or subgroup," coverage is appropriately limited to those subcommittee meetings where advice is being provided directly to an agency. I might parenthetically note, I think there is a drafting problem with that provision on the subcommittee, but that is something we can work out.

The bill would also allow the President or an agency head to terminate a statutorily created committee after giving Congress adequate notice. We believe this will improve committee management and serve economy and efficiency. We do, however, have four principal concerns with the current draft of S. 2721.

First or all, some key provisions would make it more difficult for Federal officials to use advisory committees—a point you were just discussing with the previous witness. The provisions on balanced membership are quite troublesome in this respect. While additional clarification of what constitutes balanced membership may well be needed, we believe that this matter should be addressed administratively.

The bill, in addressing this, specifies two criteria for balanced membership: "interests which will be directly affected by the committee's work," and "expertise relevant to the committee's work."

The second of these is intuitively reasonable. The first, however, takes us down a slippery slope. The qualifier directly is an attempt to limit the scope, but it nevertheless remains vague enough to be read to give standing to virtually anyone to argue that they might be affected by the work of the committee. And history teaches that argue they would.

The bill, furthermore, would require that the agency head set forth provisions to ensure balanced representation and "prescribe the factors to be considered in achieving balanced membership."

And then, finally, there is a requirement that the committee charter contain a "plan for achieving a balance in committee membership."

What would be the net effect of all of these provisions? Our concern is that the legislative history of the Federal Advisory Committee Act does stress the importance of the requirement for balanced membership, and we have no quarrel with that. But we fear that the effect of these additional provisions would be to stimulate litigation about compliance with that basic concept without actually strengthening the policy of balanced membership.

A second area of concern is that the bill is inconsistent with regard to the participation of private experts, particularly in its treatment of conflict of interest. On the one hand, the bill attempts to ensure that real experts directly affected by a committee's recommendations be included in the membership, and on the other hand, it would discourage participation by such persons by suggesting that their real stakes in the committee's work would constitute a conflict of interest. Federal employees and special Government employees are already covered under Federal conflict-of-interest statutes and standards-of-conduct regulations and we believe this coverage should be adequate.

Our third area of concern is that with regard to these detailed procedural provisions the bill as drafted treats each Presidential and agency advisory committee identically. We are concerned that the provisions discussed above, if not clarified or corrected, would impinge on the prerogatives of the President by unduly burdening the President's appointments power.

A fourth area of concern is the requirement to publish disagreements between agency heads or the President and the administrator of GSA. This requirement raises serious legal issues and could chill interagency deliberations and seriously reduce the value of the advisory committees at issue. I can expand on that if you wish.

Mr. Chairman, OMB will continue to take a great interest in the proper functioning of advisory committees and in ensuring that the statutory and regulatory underpinnings for committees provides for their proper functioning.

Careful balancing is required in order to encourage openness without undermining the usefulness of committees.

We should avoid raising unnecessarily the cost—financial and administrative—of using these committees to provide expert advice to Federal officials.

Thank you.

Chairman GLENN. Thank you. I will save questions until we get all the testimony here.

Mr. Weiss, who is Associate Administrator for Administration of the General Services Administration, accompanied by Mr. James Dean, Director of the Committee Management Secretariat at GSA.

TESTIMONY OF PAUL T. WEISS, ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION,[5] ACCOMPANIED BY JAMES DEAN, DIRECTOR, COMMITTEE MANAGEMENT SECRETARIAT, GENERAL SERVICES ADMINISTRATION

Mr. WEISS. Thank you, Mr. Chairman. It is a real pleasure to be here with you today, despite the statements we have heard. I want to thank you for the opportunity to testify today on S. 2721, the Federal Advisory Committee Act Amendments of 1988.

We also welcome the occasion to comment on the General Accounting Office's draft—I emphasize draft—report on the steps being taken to improve the Act's implementation within the Executive Branch.

Mr. Chairman, my prepared testimony addresses our comments regarding the proposed bill. With your permission, I would like to discuss the points raised by GAO on the implementation of FACA. Therefore I request that my full statement be entered in the record.

As a general observation on the statistics we saw earlier by GAO, I would just like to point out that the numbers can be misleading. In this case, the numbers did not distinguish between statutory committees and those committees created by agencies. I would like to point out for the Committee—and I am sure you are aware of this—that GSA has no authority whatsoever to engage in a consultation process on statutory committees, so until we can cull those numbers out, we are not exactly sure what the dimensions of the problem may be, as stated by GAO.

Nonetheless, we are not going to take issue with the overall findings. I think it would be constructive for all of us to give you a bit of background and to place the activities of the Secretariat into the overall context of changes occurring in GSA during the period covered by their report.

Over the past several years, GSA has been undergoing a dramatic restructuring. Just during my tenure at the agency, as a result of the Gramm-Rudman-Hollings cuts as well as the general redirections and streamlining of our operations, our total paid employment decreased by 22 percent from 1985 to 1988. That represents a drop from 25,785 employees in September of 1985 to 20,580 as of June of 1988.

If you look back to 1980, GSA has dropped by some 44 percent in total employment. Of necessity, much of our management attention was focused on implementing these changes and minimizing the adverse impact on our employees. As a result, over the past 12 to 18 months, GSA management has been directing its attention to stabilizing and redirecting the agency's very limited resources.

During this period, it became apparent that GSA's Committee Management Secretariat required considerably more management attention than it had been receiving. We thus began a process of restructuring the Secretariat, which I have discussed in my prepared statement.

The GAO's draft report on the operations of the Secretariat reflects many of the concerns that we have had over at least the last few years. Mr. Chairman, I can honestly say I am pleased that GAO has conducted a review of FACA. We need an outside competent party to take a look at the Secretariat's operations and provide their perspective of where and what kind of improvements are needed.

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[5] See p. 112 for Mr. Weiss' prepared statement.

When we receive the report formally, we will provide our views on the conclusions they have reached, with the hope that those views will be incorporated into the final report. Nevertheless, we generally accept what GAO has found and in most instances we anticipated those findings.

We are proceeding to address GAO's conclusions. Briefly, with regard to the major points raised by GAO: First, we recognize the importance of the annual comprehensive review process to the central intent of the Act. We also realize, however, that for this function to be accomplished properly, GSA has to rethink the manner it is using information collected for this purpose.

The previous approach, while effective in assuring the agency had certified the necessity of their committees, did not meet GSA's needs for conducting the type of comprehensive evaluations envisioned by FACA.

Accordingly, GSA initiated actions in 1987 to equip the Secretariat with the information processing capabilities it needs to perform this task. The unit now has state-of-the-art personal computers which are designed to maintain and process multi-year data on each Federal advisory committee. I am pleased to state that the system is now in full operation and the staff training will be completed this Fall on all aspects of its use.

While this new approach was being developed, the Secretariat has been conducting substantial reviews of individual committee operations, using data collected through the annual comprehensive review. This effort has been very successful as an interim measure in identifying and resolving problems.

Second, I believe the Committee is aware of those actions we have taken and are currently taking to clear up any confusion regarding the responsibility for providing follow-up reports on the work of presidential committees. GSA has discussed this issue thoroughly with the Committee staff and believes the approach adopted in GSA's proposed rule will be effective. That approach, in short, will require the identification of the President's delegate who will perform this function as part of the initial chartering process. GSA will then monitor progress on its automated tracking system.

Third, GSA agrees with the GAO that there should be no ambiguities or missing information in committee charters, no matter how minor. As we have advised the Committee staff, we plan to prepare a complete package of standard forms to be used in the consultation process. This will not only assure that each charter is complete, but also decrease the amount of time required to complete the consultation.

Also, committee management officers located in all major departments and agencies will then have more time to devote to the substantive portions of their responsibilities.

Finally, Mr. Chairman, we recognize that the Secretariat's resources must be used to the maximum extent to assure that agencies receive the kind and the quality of support needed. Along these lines, we have dramatically improved communication between our counterparts and instituted efforts to provide FACA training on a government-wide basis.

An Interagency Committee was created last October. It has already accomplished a great deal. One of its principal efforts has been to design the training course that I just mentioned. That course will be pilot tested during January 1989 and be made available for delivery during the spring. This effort will also include the development of a FACA brochure for use during the presidential transition and with senior executives, and a standard slide show for use of new advisory committee members.

In summary, I believe GAO's report in some measure overlooks many of the very positive changes which are now under way. The problems cited are often vestiges of earlier policies and procedures which were ineffective or which suffered from lack of sufficient resources and management attention.

I believe we are clearly beyond these constraints. I would like to invite GAO to revisit us next year to update their picture of the FACA implementation process.

Mr. Chairman, we have been very appreciative of the high level of interest shown by the Members and the staff of this Committee in FACA and its implementation. Certainly, our experience has served to underscore the complex environment within which FACA operates and the importance of the Executive and Legislative Branches working in unison to implement the Act's provisions.

This concludes my remarks and I would be pleased to answer any questions you may have.

Thank you.

Chairman GLENN. Thank you very much.

Let me come back first to this idea of balanced membership, because that is one that has bothered us a lot. Mr. Plager says that balanced membership should be addressed administratively. Now, that would mean by regulation put out there, not by what we do here necessarily.

Last December, Senator Levin and I asked GSA to issue supplemental regulations on this balance issue, and I believe GSA got its proposal to OMB in August. Has OMB approved that yet? If not, why not?

Mr. PLAGER. No, sir, that is under review. We anticipate that it will not be much longer before we have completed our review. There are a number of questions that we have come back to GSA about with regard to their proposed revision.

As you know, there have been a series of interim regulations and then NPRM's, and there obviously are a number of sticky issues. We think this last effort is a good advance and we are working with GSA to get it cleaned up.

Chairman GLENN. One of the reasons we thought this was timely now and we would like to get that regulation out and get it approved is we have a new administration coming in, of whatever party, and we would like to see this be a guidance to them as they start making appointments to committees rather than getting locked in with a lot more conflict. I would hope we could get something that takes this very difficult area and makes a little more sense out of it, maybe to guide those who are doing the appointing in the new administration.

Mr. PLAGER. I am confident, Mr. Chairman, we can get that out before the new administration comes in.

Chairman GLENN. I would hope we would have it well out. Both parties right now have groups looking into transition teams, which they have to do far in advance. They are concerned right now, of course, mainly about the secretariats and things like that and some of the 2,500 appointments that are made in a new administration, but it will not be long before they are going to be also faced with the kinds of appointments that we are talking about here today.

OMB takes the position that the bill unduly burdens the President's appointment power. Could you be more specific about that and provide us with examples of how you think this would occur, Mr. Plager?

Mr. PLAGER. Well, we begin with the premise, Mr. Chairman, that the President has to have maximum possible flexibility to get timely expert advice on questions of policy. And to the extent that the bill, by imposing elaborate administrative procedures and constraints in effect constrains the President in the use of his discretion to seek advice and to obtain advice or requires that he explain in detail the reasons for appointing advisors, we feel that it comes close to, if it does not in fact, transgress on his flexibility. It certainly would make it more difficult for the President to get the advice he needs.

This goes back to the comment I made at the beginning, which is that the bill has many salutary objectives in it, but to some extent they are conflicting. That is, we want better advice but we do not want too many committees, we want it balanced, we want everybody represented, but we do not want to have vested interests heard from.

It is hard to get all of that to work out in a piece of legislation, and our concern is to look at the total impact and we are concerned that it not unduly constrain the President's ability to——

Chairman GLENN. You are hitting the nail right on the head. That is the purpose of the bill, and it is a difficult balance to hit. You know, the ultimate authority to appoint committees would be if we had a dictator and not a President. We have split powers in this country, and so we in Congress have our responsibilities on making sure that we set the guidelines for the Executive Branch, too. So that is the difficult balance that we are trying to hit.

Mr. PLAGER. If he was a dictator, he probably would not want advice.

Chairman GLENN. That is exactly right. If he was a dictator, we would not be here to give it, too. The only good thing about that would be that you would not have to run for reelection occasionally, I guess. [Laughter.]

I do not see how the bill as we propose it would really burden the President any more than current law does. We are not really expanding the restrictions on the President, as I see it.

Mr. PLAGER. Well, for one, this business about the conflict of interest reporting procedures and the rest of that, that raises some real problems as to—I think one of the earlier witnesses noted that the bill is not clear whether those disclosures are protected disclosures, whether they ought to be disclosures.

Clearly, if the President of an Ohio company is asked to serve on a committee to give advice on the impact of some activity on industries like his or hers, it would not make sense, in my judgment at least, to require that that person disclose their financial interest in their company. I mean, they are being brought in, they are obviously identified as having a direct interest in that particular issue, and you know what their "conflict of interest" is, and indeed the bill then goes on and says that the Ethics Office will somehow resolve the conflict of interest.

Well, I do not know how you would resolve the conflict of interest if you asked somebody to be on an advisory committee by virtue of their particular experience and knowledge in a particular industry or activity that is under issue. So, in that kind of a case, it seems to us the bill imposes unwarranted procedures and might discourage a person like that from providing advice.

Now, we are equally concerned that that discouragement would impact on an agency as well as the President, but for reasons that I think are clear, our initial concern is to protect the Presidency from unwarranted limitations. It may be that there are ways of drafting around that, Mr. Chairman, but we are commenting directly on the provisions in the bill as it stands.

Chairman GLENN. Let me come back to the balanced membership that has been mentioned several times, because that is an area that I think is one that we have seen some abuse of, and that is one reason that we wrote the legislation to begin with.

To use a different example than your manufacturer in Ohio, let us say that we have something that is—we want an advisory board on pesticide use or something——

Mr. PLAGER. Yes, sir.

Chairman GLENN [continuing]. You would not have the whole membership on that board from manufacturing, or not all manufacturers of that particular pesticide. You would want the environmental concerns, you would want the manufacturing concerns, you would want the scientific people in on that, you would want a balanced membership.

Now, that is an extreme case, maybe, but maybe it is not. One of the reasons we got concerned about this was because we saw that the membership on some boards we looked at was pretty well tilted over to what obviously was a preconceived view of where the administration wanted to go. They were using the board, as we saw it, to back up their preconceived idea of where they wanted to go.

So balanced membership to me is a very important part of FACA. If you are going to form a board or a commission, the government is going to pay for it and it comes out of taxpayer money. It seems to me you have to take a balanced approach, and that is a difficult judgmental thing to do. It is difficult to write a statute that is going to guarantee honesty and integrity and all the rest; how do you guarantee things like that? You do not by legislation, but that is what we were trying to address—making sure that, whatever the societal concerns were with the board and the commission, that the pros and the cons and all factors got into that decision and were represented on that board, and were not just some group that is going to obviously rubber stamp a preconceived idea that somebody had in that department or in the White House.

So, that is the difficult situation. I am not telling you anything you do not know and I am not sure we all have the right answer on it yet.

Do you have any comment, Mr. Weiss?

Mr. **Weiss**. We have been grappling with this same thing in the development of a proposed rule—how we create the language to achieve that objective, and it is a real difficult challenge.

Chairman **Glenn**. Well, unless you have balance, you make all these committees suspect and we are going to have all sorts of difficulty unless we have that kind of balance.

Mr. **Plager**. It is made even more complicated, Mr. Chairman, by the fact that these committees do a whole array of different things. Some of them are highly technical committees.

Chairman **Glenn**. Right.

Mr. **Plager**. Some of them are broad policy committees. And what is meant by "fairly balanced" in one context would look very different from what is meant by "fairly balanced" in another context, and so your problem—I am very sympathetic with your problem, because how you draft to deal with that array of different functions is not an easy thing. It is hard to find a bright line in this very murky area.

Chairman **Glenn**. We are just trying to prevent a stacked deck going in. We are trying to get honest advice, and maybe that is difficult to achieve, but that is our purpose.

Mr. **Plager**. One which we support fully.

Chairman **Glenn**. And nobody is going to be in favor of a stacked deck, I presume, unless it is stacked in their direction, of course. [Laughter.]

GAO has found that there is a serious problem with the Committee Management Secretariat located in GSA. Do you agree with GAO's assessment of the extent of the problem? If so, what do you propose to do to help solve it?

Mr. **Weiss**. I assume that is directed to me.

Chairman **Glenn**. Yes.

Mr. **Weiss**. As I noted in my brief opening statement, also in the statement for the record, we have a plan of action laid out to correct the problems that we have identified, together with those addressed by GAO. Although as I also mentioned, I think the problem may be a bit overstated in terms of the numbers, but that is something we can work out in our response to the report.

Specifically, despite the overall reductions in the agency, you will note that we have added professional staff to the Committee Management Secretariat, and that we have installed a state-of-the-art computer system which will aid not only our staff but the agency staffs in getting the work done.

Chairman **Glenn**. But can you oversee 1,000 committees with five people? You have doubled your staff or whatever it is and you had two people to oversee 1,000 committees. They cannot keep a card file on what the committees are, let alone assess whether they have balanced membership and things like that. How can you do that even with five people?

You mentioned your budget cuts and all of that, and I am very sympathetic to that, but——

Mr. **Weiss**. The answer to your question, Mr. Chairman is no, you cannot with five people. We rely on the network of committee management officers out in the agencies. I think one of the underlying problems that we have all faced is a lack of knowledge of what FACA requires in its entirety and in its detail, and that is what we are attempting to address through the training system.

In terms of the detailed information, we just simply have not had the ability to gather that data in a timely manner. We believe we will with the automated system. In terms of evaluating the data, we are going to again rely on the CMO's to evaluate that information. And with your help and the proposed statute in requiring periodic, rather than annual reviews, we will get out there and review those committees that really require a close analysis, maybe annually in some instances, others maybe less frequently, but we rely on you and your Committee to guide us to some extent in that area.

Chairman **Glenn**. Mr. Plager, they are doing some things, but do you agree that this is a very serious problem, that GAO has pointed out? Do you agree with GAO's assessment of the extent of the problem?

Mr. **Plager**. I have not seen their final report, Mr. Chairman, because it has not yet been released. From what I understand of the drafts that they have made available, they have identified a number of problems and I think GSA and OMB would agree that there have been problems. I am not sure we agree with every determination of the extent of the problem or so on. As I say, we have not really seen the final.

I agree with Mr. Weiss' assessment, which is that GSA has been taking a responsible approach, acknowledging its problems, and has indeed been making herculean efforts, given the relatively small staff they do have. You know, in the best of all possible worlds, they would have unlimited resources and unlimited staff and this whole thing would be managed marvelously, but as everywhere in the government, we are trying to do the best we can with the limited resources.

In 1987, we increased the funding for this operation, and the 1988 budget maintained those increases, so we are recognizing the need and we are going to work closely with Mr. Weiss, and I think the GAO report will be very valuable to all of us in identifying issues that do need attention.

Chairman **Glenn**. Just one other area, and that is—you have not heard this testimony yet, but in his written testimony, which we have reviewed, Mr. Longo, Michael Longo, who is the University Counsel of the University of Southern California, states that there should be some mechanism, perhaps a letter, to inform prospective advisory committee members and their employers of their obligations under FACA and applicable conflict of interest laws. Is that not done now? I thought that was just automatically being done, as people are asked to come on a committee. If not, do you think it should be done? What recommendation do you have, if any?

Mr. **Weiss**. I will ask Jim to answer whether it is being done in all cases right now. But I can tell you from my point of view and from the agency's point of view, it certainly should be done and it will be done.

Chairman Glenn. Is that not done now, Mr. Dean?

Mr. Dean. If it is being done, Senator, it is not being done uniformally. Not all advisory committee members are subject to the conflict of interest laws, as you know, but I would certainly endorse that suggestion to the extent that they are covered. They ought to know the conditions of their service with the government.

Mr. Weiss. That goes back again to our plans for briefing incoming members and training CMO's. That would be part of the training.

Chairman Glenn. It is certainly not fair unless it is done. If I am asked to come in on some committee and I say yes, I will serve. I am glad to donate some of my time, glad to come in and do this thing, and then I find out belatedly I come in and attend two meetings and all at once there is a lawsuit filed against me for some conflict of interest, I am going to be a little unhappy about it. I think it would only be fair to tell people in advance what they are getting into.

Mr. Dean. Absolutely. That is why we are trying to address this whole problem from a systemic point of view. If I can just go back for just a moment and talk about the Secretariat staff, the relatively small number of five really does not portray the total picture. I think we have to look at the quality of the Secretariat's operations.

During the past year or so, we have been trying to work to increase our productivity, and part of that has been in making us more efficient by making the departments and agencies more efficient. To the extent that we can, if they can solve many of their own problems, they do not bring them to us, which means that we can focus on more important responsibilities. That general strategy kind of flows throughout everything we have done for the past 18 months, and I think it is being effective.

Chairman Glenn. Before the panel leaves, let me just make one statement, because I do not want this hearing to be interpreted as though I am against all these committees, commissions and councils and boards. I am not, and neither is Senator Levin.

We realize that quite often you can get more good, sound, solid advice from some of these boards and committees and commissions that are formed because experts really are willing to come in and take some of their time to help government out. Otherwise, you would have to be hiring people, many at high salaries, and put them on permanent staff. With an advisory committee, you can bring them in, focus on a problem and get some truly expert advice, and get that at practically no cost to the government.

So, I favor this, I am not against it, and I wanted to make that very clear. I sound as though I am negative sometimes by the questions I am asking, but I wanted the record to show that I very much favor that kind of activity, but it has to be controlled so it is not biased advice and so that we have balanced membership, to come back to that for the fourteenth time, and so they are really used for the purpose for which they were intended.

Mr. Dean. I do not think we can forget the members themselves either, Senator, because we sometimes forget that it is important for the members to know what laws apply to them. For example, many do not even understand FACA fully, and that is why we want to develop some tools for them to understand the environment that they are operating in. I think that would help.

Chairman **Glenn**. I was just ready to move on to the next panel, but I was just handed a question here that Senator Levin would like me to ask, since he could not be here this morning, so I ask this on behalf of Senator Levin.

In the April Committee hearing that examined DOD-SDIO compliance with FACA, we documented a host of problems. SDIO had five advisory committees that had never been chartered, as required by FACA, with no minutes or other records, no open meetings or meeting announcements, and no financial disclosure forms.

The one chartered committee of SDIO called the SDI Advisory Committee failed to comply with financial disclosure rules for DOD's advisory committees. Its members had potential conflicts of interest and its subcommittees operated outside FACA. DOD had fallen off in the committee reviews it had promised to undertake to insure compliance with FACA.

This is Carl Levin speaking:

> I asked the Committee Management Secretariat to monitor DOD and SDIO's efforts to improve their compliance with FACA and to report to this Committee quarterly. I was asking the Secretariat to exercise its oversight authority. I was not happy with the results. The Secretariat did not produce the report until my staff asked for it. It was about a month overdue. The report noted that DOD had resumed its committees reviews and reported on the number scheduled and completed, but contained no evaluation of the quality of those reviews and no response to the information contained in them.
>
> My staff read the committee reviews produced by DOD. They were of fairly good quality, but indicated a number of problems with appointments, financial disclosure forms and inactive committees. GSA's report makes no mention of any of that.
>
> In September, the Secretariat sent me a summary on the Eastport group. It was not prepared by GSA. GSA merely forwarded information sent to them by DOD. My staff reviewed this information and found it to contain incomplete and inaccurate data. There was no independent GSA analysis of the summary or of Eastport or DOD actions in establishing, operating and terminating that unchartered committee. There was no mention of OGE's report on Eastport, despite the fact that my staff provided GSA with a copy.

Senator Levin's question is: "What is going on here? How can we have confidence in GSA's oversight if this is the type of work you do?" How would you reply to that?

Mr. **Weiss**. Mr. Chairman, I will ask Mr. Dean to reply, since he has been working directly with the staff on it.

Mr. **Dean**. Mr. Chairman, at the time we filed our first quarterly report with the Committee, we did not have the evaluations that DOD had conducted. At the same time, we did not have the report from the Office of Government Ethics. That was given to me last week by the Committee staff. I gave the Committee a copy of the evaluations as soon as I had them, because I knew that they wanted to evaluate them.

Finally, we were anxious to get you the information that we received on the Eastport Committee, simply because this hearing was coming up. We planned to comment on all those items to you in our second quarterly report, but there simply was not time and we just wanted the Committee to have what we have.

Now, we think that DOD is making a good-faith effort, and I think the evaluations that they have submitted have in fact identified a number of problems. We have talked to the——

Chairman GLENN. Let me follow up on behalf of Senator Levin: The problems identified in April were in the papers, it was talked about up here. Does this committee have to make a formal request before you look into something like that when it is in the public domain?

Mr. DEAN. Oh, not at all. We are looking to a number of areas, including the issues raised last year.

Chairman GLENN. Why did it take from April until last week when you were formally asked to do something about this? That is a pretty sad record.

Mr. DEAN. I do not think that is accurate. I do not understand your question. We filed our first quarterly report I believe in August.

Mr. WEISS. My information indicates we did transmit to the Committee in August a report in response to that question, and I believe we did comment in some detail on various aspects of DOD's response. But I can say from my knowledge of this and my involvement with it, that we are continuing to work with DOD. We did not accept that as the final report. We view that as an interim report. They are reviewing a number of different facets involved in responding, and we can't give you a full response, because we are not fully satisfied yet, quite frankly, and neither is DOD. But we are working again continuously with them to give you a full report.

Chairman GLENN. When we see things like this, as Senator Levin is pointing out, it is exactly the reason why we feel we have to tighten these committees up, when they are being abused, and this is major abuse. You know, no minutes were held of the meetings, no records, no open meetings, no meeting announcements, no financial disclosure forms, and the one authorized, the one chartered committee of SDIO failed to comply with financial disclosure rules, members had potential conflicts of interest, subcommittees operated outside FACA. That is the kind of thing GSA is supposed to be stomping on, I would think, on our behalf.

Mr. DEAN. It is, but as the record showed in April, many of the problems that DOD was having were as a result of poor management and internal management controls. They did not know about the committee, so I am not sure how GSA would know about the committee. Nevertheless, we did try to do a good follow-up report to you in August, noting that some progress had been made, more progress was needed, and that we would be filing our next quarterly report to you in November outlining additional actions taken.

So, I believe that we fulfilled our commitment up to this point to the Committee. We are continuing to work with DOD, and I think that we will have some comments for you in November which I think you will find interesting on the progress to date.

Mr. WEISS. In short, Mr. Chairman, the process is not complete, I think that is what we are trying to say. We are anxious to get to you the information that had been sought. We realize that it is not complete, but we are working toward that completion.

Chairman GLENN. Okay. That is why we felt we needed this information. Let me talk to Senator Levin here for just a moment.

[Discussion off the record.]

Chairman GLENN. I was just explaining that I had read this whole page of Senator Levin's so I am glad he is able to join us. I was going back through some of the points I had made in asking questions about how far we had gotten, so I will turn it over to him.

Senator LEVIN. Thank you, Mr. Chairman.

First, let me congratulate you, Mr. Chairman. As usual, you are pursuing a nitty-gritty, nuts and bolts subject which has to be pursued and overseen. It is not the most glamorous subject frequently, but it is essential, and your persistence and tenacity in this area is really very, very impressive.

Just a few questions of GSA, and I appreciate your asking on my behalf some of my questions. I gather that the GSA did not analyze the DOD committee reviews, because GSA did not have them in time.

We have analyzed them, and let me give you the outcome of our analysis. Four-tenths of the committees had no financial disclosure forms or the forms that they have are outdated. When I say four-tenths, that is 4 out of the 10 committees reviewed by DOD so far.

Four out of the 10 committees are inactive, yet have not been terminated. One has never held a meeting in years, one has held no meeting in 3 years, one has held no meeting in 2 years, and so forth.

Four out of the 10 committees have had problems with issuing timely notice of meetings, where they are closed to the public.

Two out of the 10 committees have members who were not appointed as consultants, as required by DOD rules, and so these members may not be subject to the Department of Defense standards of conduct.

Two out of the 10 committees have problems with their minutes.

Only 2 out of the 10 DOD Committees reported no problems.

My question to you is, now that those DOD committee reviews are available to you, and assuming that I am accurate in our analysis of those reviews, are you going to do anything about it and is DOD going to do anything about it?

Mr. WEISS. Absolutely. As I mentioned before you entered, Senator, we have been in constant contact with the Department of Defense, at both my level and at the staff level through Mr. Dean, and we did provide you what I call an interim report in August as to just where we were.

We do not view this process as complete until FACA is fully complied with, and DOD feels the same way at the Assistant Secretary level. Again, to make the answer brief, we intend to follow this thing out until that process is complete.

Senator LEVIN. So, in your next report, you will do the analysis and will tell us what steps have been taken to correct it?

Mr. WEISS. The resolution, absolutely.

Senator LEVIN. Just two additional questions.

Chairman GLENN. Could I interrupt for one second here? Mr. Plager wanted to leave by 11:15. It is a little after that. He had another engagement, as I understood it, and if you have any questions of him, get them in and then we will let him leave, if you could.

Senator **Levin**. I just have two additional questions of Mr. Weiss.

Mr. **Plager**. Thank you, sir. I appreciate it.

Senator **Levin**. Thank you, Mr. Chairman.

Has GSA developed any materials that alert agencies to the unchartered committee problem?

Mr. **Weiss**. Yes, we are, sir. We are addressing it from several different angles. We have created an Interagency Committee made up of 22 to 25 members, I believe it is, agencies where these issues are discussed. I believe the committee meets every month or two.

Mr. **Dean**. That is correct.

Mr. **Weiss**. We have done that. We are developing training in the whole FACA area for the committee management officers, as to what they should be looking for in applying and interpreting the Act, one of which would be to make sure you look at all those committees out there, all those groups that may come under the coverage of the Act and ascertain whether or not they should be.

Senator **Levin**. Are you using a check list now?

Mr. **Weiss**. Currently, I do not believe we have a check list. I will ask Jim.

Mr. **Dean**. Not per se.

Senator **Levin**. Would it not be useful to develop a checklist so you could take a look at all of the requirements for committees and to check off whether they meet those requirements?

Mr. **Dean**. Absolutely. We mentioned earlier that we are developing standard forms for the consultation process, and that could be part of that effort.

Senator **Levin**. Obviously, we are not satisfied with the aggressiveness of GSA in the past in overseeing these committees. I gather that GSA is not satisfied either, from your testimony this morning, and we all want that to change. The Chairman and I have a bill which we will be talking about with the next panel, I believe, and perhaps you have had some testimony on that which I have missed. We really are going to insist that a better job be done in terms of compliance with FACA and I gather you have expressed a willingness to participate in a much more aggressive oversight process. It is very much needed and welcomed.

Mr. **Weiss**. Absolutely, Senator. We take this responsibility seriously and we believe that the intent of the Act, as the Chairman pointed out earlier, is that these committees provide a very valuable and very inexpensive service to the Federal Government, and there is nothing we want to do more than to make sure that service is delivered well and according to the law.

Senator **Levin**. Thank you, Mr. Chairman.

Chairman **Glenn**. Thank you.

The next panel is Mr. Michael Longo, University Counsel, University of Southern California; Brian Murphy, Chairman, Select Committee on FACA, Federal Bar Association; Ms. Roberta Fede, President, Federal Advisory Committee Management Association; and Eric Glitzenstein, Public Citizen Litigation Group.

We welcome the four of you. Mr. Longo, lead off, if you will, and we welcome abbreviated versions of your statements, and your longer statements will be included in the record in their entirety.

TESTIMONY OF MICHAEL R. LONGO III, UNIVERSITY COUNSEL, UNIVERSITY OF SOUTHERN CALIFORNIA;[6] BRIAN C. MURPHY, CHAIRMAN, SELECT COMMITTEE ON FACA, FEDERAL BAR ASSOCIATION;[7] ROBERTA R. FEDE, PRESIDENT, FEDERAL ADVISORY COMMITTEE MANAGEMENT ASSOCIATION;[8] AND ERIC R. GLITZENSTEIN, PUBLIC CITIZEN LITIGATION GROUP[9]

Mr. LONGO. Thank you, Senator. I appreciate the opportunity to appear before this Committee on behalf of the University of Southern California, to discuss the proposed amendments to FACA.

I do believe it will be useful for all of the membership of this Committee to have some input from the ultimate end user, the consumer, if you will, of the Act, how the Act and related Federal conflict-of-interest provisions apply to members of an academic and university research community.

Our statement today will focus on our experiences under the existing legislation and on some of the anticipated effects of the proposed revisions, keeping in mind at all times that our perspective is one of an employer attempting to insure that its diverse employee pool complies with FACA's requirements.

We will also address the problems which FACA poses for members of the academic and research community when they endeavor to serve the Federal Government in an advisory capacity, and will examine whether the proposed revisions help solve some of the problems which we have identified.

Finally, we hope to offer some suggestions which we believe will be useful in helping us to ensure that our employees do comply with the law.

The University of Southern California is one of the premier private research and teaching universities in the Nation, noted for its dynamic faculty and outstanding research facilities. The university operates over 27 departments and divisions on two separate campuses. The range and breadth of our research is, therefore, quite extensive.

Mr. Chairman, in earlier testimony you had expressed concern about the number of DHHS committees. I just wanted to let you know that a significant percentage of our research is in the medical field, so I think that may also explain the reason for the inflated numbers, if you will.

As with any major university, we employ a number of professors, research faculty members, administrative and other professionals who are well-respected as experts in their fields. As a result of their expertise, these employees are often asked to advise the Federal Government in their individual capacity and also as representatives of the university.

As you are already well aware, Mr. Chairman, the Information Sciences Institute, one of our leading research units, became involved in the problem of the applicability of FACA and the various conflict of interest provisions.

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[6] See p. 124 for Mr. Longo's prepared statement.

[7] See p. 147 for Mr. Murphy's prepared statement.

[8] See p. 157 for Ms. Fede's prepared statement.

[9] See p. 171 for Mr. Glitzenstein's prepared statement.

When I attended the April 19 hearing of this Committee regarding Eastport and ISI, the testimony raised concern on my part, not only about ISI but also about other researchers at my institution and at others across the Nation. Several of the questions which came to mind included:

Have other researchers at various universities received advice similar to that received by our employees in the founding of the Eastport committee?

How many other potential "Eastports" are there in our academic environment, as well as at other universities?

With the support of my academic and administrative leadership, we decided first to find out how many of our researchers are involved in providing advice to various government agencies and to determine which organizations are establishing such advisory committees.

From our perspective, a more important question dealt with our commitment to educate our faculty concerning the existence of FACA and the other various conflict of interest rules and regulations. We drafted a letter to them to this effect that also included suggested questions that they should ask of government officials seeking their services on various advisory panels.

Our FACA audit began with the current academic semester, which began in early September, and therefore unfortunately we do not have useful statistical information to share with the Committee. We will be happy to provide that if you believe it would be appropriate and useful.

Chairman GLENN. We would like to have that.

Mr. LONGO. However, in the preparation and circulation of a draft of our "notice" letter and in our early conversations with members of our faculty, we discovered a number of interesting points which we believe are appropriate to share with the Committee. The following information, although preliminary, we think is very interesting:

First, as we had expected, each of the many Federal agencies involved in the establishment of committees in one form or another have different interpretations of FACA's applicability. Some agencies do not believe that FACA applies to their situations because advisors are being obtained under established Federal contracts.

In other cases, we discovered that advisory committees were being designated as "summer studies," "research groups," "working groups," or other such nomenclature designed to give the impression at least that the operations of these committees was outside of the scope of FACA.

In addition, each of the Federal agencies has its own standards of ethical conduct, its own rules and regulations, and its own interpretations of these various rules and regulations. This information, unfortunately, has led us to the conclusion that we cannot give our members of our faculty and our researchers accurate and clear guidance with respect to FACA compliance and conflict questions without sorting through the rules of each founding Federal agency.

Of even greater concern to us and of serious concern to the Committee I think is the fact that when we asked our researchers and faculty members to ask simple questions of the organizers of these various advisory committees concerning their formation and organization, they were met with an incredibly hostile reaction from the organizers. In some cases, this reaction caused concern that our faculty members would be excluded from service on the committees and/or on future advisory panels organized by the respective Federal agencies.

We were dismayed to discover that even sophisticated potential committee members became reluctant to raise questions about the formation and operation of committees because of their concern about being excluded from these panels. This "fear" is something that I cannot overestimate to you, Senator. It is prevalent throughout the research community. Experts are reluctant to question agency officials, because they believe that by asking such probative questions their opportunities to serve on these committees will be significantly diminished.

I also want to note that participation on these panels is important and is viewed by members of the research community as an extremely important component of their activity. Exclusion from such participation can have a significant negative impact on their career.

In its present form, FACA poses problems for potential advisors and for their employers. The single most important of these from our perspective is FACA's failure to provide adequate notice to individuals asked to serve on such committees. The Act contains no mechanism by which persons whom are asked to participate in an advisory group can determine whether that group meets the requirements of FACA. The average university professor knows very little, if anything, about the rules which govern advisory committees. Therefore, individuals are not qualified to investigate whether the advisory group is properly conducted or what, if any, standards of conduct govern their act.

In our earlier testimony, we noted that our researchers and faculty members are not likely to investigate the formation of the panels upon which they have been asked to serve, and that they operate under the assumption that the government agency which has requested their services has acted within the parameters of its authority and would not act improperly.

The proposed revisions to FACA would not solve this particular dilemma. This revision does provide that all committee charters include a statement indicating whether or not committee members serve in the capacity of "special government employees." However, the provision does not provide for explicit notice of this status to potential committee members.

Section 7 of the revised Act provides that committee charters need only be filed with the Administrator, the head of the establishing agency, and the appropriate standing committee of Congress, if any. A potential committee member receives no notice, however, as to whether that committee has been chartered pursuant to FACA, nor of their status as special government employee or otherwise.

We do believe that the revisions are a welcome step in the right direction. The statute as amended does give potential members at least some implicit notice that their activities may be governed by Federal ethics and conflict-of-interest laws.

We hope that the resolution process, which is designed to resolve potential conflicts of interest before members are appointed, will give potential committee members some notice that their activities are governed under Federal law and what those particular standards are.

However, because many of the individuals asked to serve on such committees often lack sophistication when dealing with complicated legal issues, we believe that the notice provision should be more explicit.

A second and related problem is that there are not adequate mechanisms by which committee members can obtain information about the formation of the committee.

As you are well aware, Senator, FACA imposes a number of substantial, though necessary, we believe, constraints on the formation and operation of advisory committees, and we believe that the new iteration of the Act imposes even more stringent requirements.

Because of these requirements, in some instances Federal agencies attempt to skirt the existing regulations through strained construction of the Act and other conflict-of-interest provisions. In other cases, even good-faith attempts at compliance are equally unsuccessful due to the difficulty inherent in interpreting the meaning of the legislation. Imposition of greater restrictions may, in some cases, provide greater incentive to Federal agencies to avoid these rules.

Most interpretations of FACA do not recognize the applicability of the Act in situations where advisory committees are established by independent contractors. In order to avoid the restrictions of FACA, Federal agencies sometimes incorporate these committees' functions into existing government contracts by simply modifying the statement of work to be performed under the contract. Such a committee may be effectively organized by the establishing agency through the contractor and may make its recommendations either directly to the contractor or to the agency itself.

We believe, from an institutional perspective, contractor operated advisory committees make it impossible for us to effectively monitor the activities of our researchers and our faculty members. Such an approach also precludes counsels from rendering meaningful before-the-fact legal advice to any researcher courageous enough to ask for it.

We believe that there are certain things that the legislation as amended should do:

First, direct notice should be provided to potential committee members before they are appointed to serve on advisory committees. Such notice should explicitly state that they are being asked to serve on a FACA-governed, Federal advisory committee, and that their conduct as well as that of their employers may be subject to certain Federal laws and regulations. This notice should consist, in our opinion, of a formal "letter of request to serve" which should precede any required financial disclosure forms.

A letter such as this will accomplish two things: First, it will provide relatively formal notice to the unsophisticated researcher as to precisely what laws he or she will be subject to as a result of committee appointment.

Second, the letter will give the sophisticated researcher a better indication as to whether the Federal officials organizing the advisory committees are doing so in accordance with the provisions of FACA.

In short, Mr. Chairman, we believe that the proposed amendments should be made more specific and should build in procedural and notice safeguards for the protection of the prospective committee members and their employers.

Although the scope of this hearing is necessarily limited to the proposed changes in FACA, we would like to comment on a couple of other points. We believe that the revision of FACA, in and of itself, will not be sufficient to meet the goals that this Committee has established. We believe that it is appropriate to address other problems which make it difficult for best-intentioned laymen serving as government advisors to do so without risking potential criminal sanctions.

Some of these problems include lack of clear and concise definitions, lack of organized and cohesive information available to researchers and the presence of conflicting interpretations.

I would like to deviate a little bit from my previously submitted written testimony to mention a couple of instances which have occurred in recent weeks since we submitted our written testimony to you.

We received three telephone calls of particular interest. The first was from an outside professor, that is, a professor from a different academic institution. This telephone call was prompted because this individual had spoken with one of our faculty members concerning their involvement in our FACA audit, and their concern was that this individual had been appointed to a Federal committee, they did not know whether it was chartered or not, they had not received any guidance from the people that were forming the committee, and they wondered what background and information our professor could provide them with.

Our professor provided them with the information which we had given to that professor, and the institution—I will not name the institution, but the institution's counsel was not really helpful to this particular individual. However, using our questions and applying these questions to the chartering government official, it was determined that in fact it was a FACA governed committee, but that no notice had been provided to the individual as to what his standard of conduct should be, and it was not until 4 days after asking these questions that a letter was sent by the government official organizing the committee advising the individual that he was in fact on a FACA governed committee and that there were certain standards of conduct that applied.

Immediately thereafter, he was forced to resign because in his perception there was a potential conflict of interest. But this is an illustration of a point that I think is very important.

A second situation involved a professor at our institution who did ask a number of the questions that we suggested they ask and received from the government official trying to organize the committee the following comment, that is, I am concerned, if you do not want to serve, do not. We think that that kind of an approach on the part of the government officials goes completely against the notion what the notion of this Committee is trying to foster, and that is an approach which suggests that when FACA governs, people ought to know what the law says and ought to know what their standards of conduct are.

Finally, we found that one of the questions that we came up with that we could not answer, was what happens in a situation where one of our employees in a particular division is asked to serve on a committee which deals with certain information, and the institution at another division, on another campus is doing research in that area, does that preclude that employee from serving, how do we know, how do we allow our employees to serve on such committees when the institution risks potential sanctions after the fact.

Let me just summarize, Mr. Chairman. We believe very strongly in the effectiveness and appropriateness of soliciting the advice of university based experts by the Federal Government. We believe that universities have an ethical obligation to make this cost-effective means of obtaining valuable information and advice available to the Government.

We actively support the efforts of this Committee to capitalize on the experience of the years since FACA was enacted. We believe that now is the appropriate time to strengthen the Act, and we as a university join with you in that effort.

We also believe, however, that you have an obligation to us to provide us with clear guidelines and adequate forms of notice and protection in order that we may properly advise our researchers and faculty members as to the standard of conduct expected of them and the consequences of their service.

That concludes my formal testimony, and I would be happy to answer any questions.

Chairman GLENN. Thank you very much. We have lots of conflicts we are assessing this morning, not the least of which is conflict of schedules that some of us have here, and Senator Levin has to leave in a few minutes and he has a couple of questions he would like to ask Mr. Longo. We normally have the whole panel testify before we get to questions, but, Mr. Longo, if you could answer a couple of questions now so Senator Levin can get those in.

Senator LEVIN. Thank you, Mr. Chairman, for your usual courtesy.

Mr. Longo, first let me thank you for coming this far. You have come a long way for this hearing, and we all appreciate it. At the last hearing or the hearing that you made reference to, we hit Eastport and ISI pretty hard. You made reference to that. You responded very positively to that, very helpfully to this Committee, and we appreciate that response on your part.

Mr. LONGO. Thank you, Senator.

Senator LEVIN. The only question that I have has to do with your point that there simply is a lack of information to potential committee members and to serving committee members as to what their obligations are under FACA. I think you have made that point very eloquently here.

As a matter of fact, you made reference, I think, on page 6 of your testimony to an incredibly "hostile reaction" from organizers of committees when they were asked questions about rights and responsibilities under FACA, given the lack of any cohesive information from the government. You may have already given us the example that you are referring to in your testimony. If you have, fine. If not, can you give us some examples of the hostile reaction that was received by people just because they wanted to find out about their obligations under FACA? Again, if that was the example you already gave, fine.

Mr. LONGO. That was just the most recent example. Right at the very beginning, we began to run into reluctance on the part of our faculty members to even ask the questions, because their perception was that when pressed in different committees that they had served on about process and procedure, that the organizers were very reluctant to provide them with information. Whether it was because the organizers themselves did not know, or whether it was because they just did not want to provide the information, we do not really know.

The kinds of questions that we were asking were simple, they were organizational questions, questions such as is this a committee that is being established pursuant to FACA, and the response that we got back was consistent with what I have already said, and that is that if you are not interested in serving, then do not, and that is not the kind of response we anticipated.

We anticipated that they would come back and provide us with information that would be helpful and useful in determining whether in fact there was a conflict, whether there were potential conflicts, what the standards of conduct were, and so forth. So, I am not trying to avoid a specific answer to your question, but it was the kind of reaction, the tone of the reaction that we received consistently that, why are you troubling us with these questions, we have more important things to do here on this committee, we are not here to discuss FACA, we are here to discuss whatever the particular research subject is.

Senator LEVIN. Mr. Chairman, this hearing is serving many useful purposes. It seems to me this testimony is pretty eloquent evidence of the need for some kind of information, simple information to be made available. I would hope—I see that Mr. Dean is still here from GSA—that GSA would put together a brochure which would be government-wide and which would apply to all potential members of committees and members of committees who want to know what their rights and responsibilities and standards of conduct are under FACA.

That is just so fundamental and basic that GSA should put together that brochure, and I would hope that could be forthcoming soon. Mr. Dean, you can take that back to GSA, if you would, if the Chairman agrees, and maybe even get us a draft.

Chairman GLENN. I agree completely.

Mr. Dean, do you not have that now? Do you have anything like that now, a little information sheet that says yes, the position that you are being considered for is under FACA, and would require a conflict of interest form? You do not have that now? I am asking Mr. Dean back there in the audience.

Mr. DEAN. No, we do not.

Chairman GLENN. Do you not think that would be a good idea, as Senator Levin suggests, that we have that? Here we have people trying to serve and trying to do the right thing, trying to help out their government.

Senator LEVIN. Thank you, Mr. Chairman.

Chairman GLENN. Just do it, that is all.

Senator LEVIN. Again, my thanks to the University of Southern California for the kind of response that we have seen from them. It is always a bit embarrassing when something is made a subject of a hearing and you responded very, very well and in a way which is extremely helpful to this Committee.

Mr. LONGO. Thank you, sir.

Senator LEVIN. I am sorry that I have to leave and miss the other witnesses.

Chairman GLENN. Thank you.

Mr. Brian Murphy, Chairman, Select Committee on FACA of the Federal Bar Association.

Mr. Murphy?

Mr. MURPHY. Thank you, Mr. Chairman. Thank you, Senator Levin.

On behalf of the Federal Bar Association, I would like to thank both Senator Glenn and Senator Levin as well as Senator Roth and the other members of the Committee and your very capable staff who have worked long and hard, and, I think, very usefully on the subject of citizen participation in government through the Federal Advisory Committee Act.

I am going to step out of the order of my remarks, because there is such great interest in conflict of interest standards that it may be useful to do so.

Our Select Committee of the Federal Bar Association, which, I might add, is called the "Select Committee" because we have the benefit of having as members not only of lawyers, but some very capable professional managers, committee management officers and others who have a long and demonstrated interest in advisory committee management.

We feel as a group that there is nothing inherently wrong with conflicts of interest on the part of advisory committee members. In fact, they are useful. You want divergent views, obviously. But it is also very necessary, as has been made clear, that if there are conflicts, they be brought to the public eye, into the sunshine.

Chairman GLENN. Well, if there are conflicts and you think that is not bad, how do you get, then, a balance of conflicting interests on the committee? You are really complicating things, it would seem to me. That would be necessary if you had conflicts of interest. They have got to be balanced at both ends, then, and admittedly there.

Mr. MURPHY. Certainly, Mr. Chairman, if we take a certain industry sector, you will want a divergent spectrum of different opinions on the part of your experts, but the fact that your experts work for U.S. Steel or Bethlehem or somebody else and they have the steel industry's interests in mind is not disqualifying. What you need, of course, is disclosure.

Now, I do not have all the answers there, but I would like to point out, speaking unofficially just as an interested observer, one government agency, the Administrative Conference of the United States, has identified some of these problems and is currently doing an indepth study. We hope very much that that study will be completed within the next couple of months. As I think many of you know, that agency is an advisory committee and it will present its findings for public discussion, and for dissemination to the relevant agencies.

I do believe that the consultant for the Administrative Conference feels that there should be a separate regime of conflict of interest standards applicable to advisory committee members. It is very clear that there is no uniformity among the government agencies. The Office of Government Ethics has studied this matter. I do not speak for them, obviously, but there is a lot of uncertainty as to what should and should not apply, but there is one agency that is taking a concerted look at this, and I know that they will want to share their views with you when it is appropriate. So, I just say there is nothing wrong inherently with conflicts, so long as they are in the sunshine.

I would like to touch on another subject which I have not heard discussed today, but which was made very clear to me as very important when I did a study for the Office of Management and Budget in the early 1980's, and that is the question of how you balance the requirements of FACA for open meetings and chartering with other Federal legal requirements to have Federal officials meet with State and local government officials.

Many agencies are required, let us say the Environmental Protection Agency by the Clean Water Act, to consult with State and local government officials on standards that would apply locally. The Army Corps of Engineers, when it is building a dam, certainly has to and is required by law, I believe, to talk to local engineers, to talk to the local mayors and so forth.

A number of agencies have—probably all do, but a number of them have so indicated—major problems complying with FACA's open meeting requirements. It may be useful and constructive just to quote very briefly from one eloquent statement of this problem:

"Programs such as the Federal-Aid Highway Program and the Air Pollution Program under the Clean Air Act are examples of the many programs which require close coordination between State and local government officials and Federal officials, to insure their effective planning and implementation. In many cases, the most effective means of carrying out the necessary coordination is through meetings. Since these groups, when they meet, often develop advice or recommendations which are utilized by the Federal Government, the Federal Advisory Committee Act is interpreted to apply. However, these meetings on shared programs are very closely analogous to working meetings within the Executive Branch on purely Federal programs, which the FACA does not cover.

"The number of meetings held by State and local government officials and the fact that they often must be held on short notice makes compliance with the FACA virtually impossible."

I might say that GSA, I think, has gone a long way to making it less difficult, easing the process, in other words, but it is still very tough to hold meetings with State and local government officials on short notice when you are required by other statutes to do so. I could cite many other examples. The Federal Bar Select Committee feels that Congressional clarification of the precedence of these divergent legal requirements would be most helpful.

I should speak personally and not as the Chairman of the Federal Bar Committee when I say that one possible resolution of this problem would be for Congress to provide an exclusion from FACA's coverage for any group composed of a combination of Federal, State and local government officers and employees who act in their official capacities, when they are convened to provide advice and recommendations regarding programs that are shared by Federal, State and/or local governments.

The proposed exclusion from FACA would be limited to governmental officials acting in their official capacities on shared programs and would not extend to interest groups representing the officials. Obviously, there is a problem of opening the floodgates if every group that holds itself out as representing the mayors of this country or the representatives of State and local governments as a trade association gets some special access to Federal officials.

On the other hand, in a Federal system, it seems to me that there has to be some recognition of the need for Federal, State and local government officials to talk. Under this approach, meetings involving Federal, State and local government officials would not be exempt from FACA when the State and local officials are themselves acting like interest groups, as when they are lobbying Federal officials for funds to build State highways.

I am aware and there are court cases that say that when State and local officials are acting like their brethren and sisters in trade associations on non-governmental issues, that they should not be treated separately. I do feel, however, that an appropriate exclusion could be crafted.

I might say further that I have elaborated on this subject in a report I did for the Office of Management and Budget which, with your permission, Mr. Chairman, I would like to include with my prepared remarks.

Chairman GLENN. If you could submit those, we will have the Committee staff look at them and see if we want to include them or not.

Mr. MURPHY. Just a couple more points to take your time on the definitions. I think your draft in S. 2721 is a great step forward and we really do appreciate the willingness of the staff to work hand-in-hand with so many divergent groups.

However, we of the Select Committee are concerned about a few of those definitions. One is the use of the term "utilize." We have in the Act the phrase "established or utilized" throughout, but it is nowhere defined and it has led to a number of questions.

"Utilize" is used when the text is referring to the advisory groups that are established by the U.S. Government, in the "established or utilized" context. The connotation of "utilized," however, is unclear and would benefit from definition by the General Services Administration in their regulations.

I might add that many of these problems will not be resolved today, and probably will not be resolved by this Committee or the full Senate, but many of them can be resolved, we feel, by GSA in its notice and comment period on regulations.

I would say that we have seen great strides in the right direction on GSA's management of FACA. I will say more in just a moment, but I think it is reasonable for them to involve the interested public on some of these definitions.

Another definitional concern is that of "meeting" in section 3(5). We feel that it reflects an inappropriate application of the Government in the Sunshine Act to the Federal advisory committee process. It provides that the term "meeting" includes any——

Chairman GLENN. Mr. Murphy, I am going to have to interrupt here for a minute. All of that buzzing going on on the clock and the five lights means I have to run to the floor to vote, and so we are going to have to suspend here temporarily. I will get over there and get back as fast as I can. I am sorry to interrupt this, but I am going to miss the vote if I do not get going.

Mr. MURPHY. Thank you.

Chairman GLENN. The Committee will stand in recess.

[Short recess.]

Chairman GLENN. The Committee will come to order.

I am sorry for such breaks, but that is beyond my control. Mr. Murphy, go ahead and continue.

Mr. MURPHY. Thank you, Mr. Chairman. I will be very brief.

I was speaking about the definition of the term "meeting" in section 3(5) of S. 2721. The Federal Bar Select Committee is concerned about the rewording of that definition. It provides that the term "meeting" includes any interaction among a majority of advisory committee members at which the substantive business of the committee is discussed or any interaction among members of a subcommittee or subgroup.

The Federal Bar Select Committee feels that this redefinition may cause some difficulty. The best example would be the learning provided by the National Economic Commission which, as you know, is headed by very distinguished persons, Bob Strauss and Drew Lewis. The media has carried information to the effect that the commission has been holding closed meetings. They have been doing that on the justification that, when one half or fewer of the committee members convene, under the Sunshine Act they do not have to have open meetings.

We are very concerned about that, and I think that the commission will be holding more open meetings in the future. That is an example that shows to me and the Select Committee that this definition may invite abuse.

As an alternative, the Federal Bar Select Committee recommends that the term "meeting" be defined to include any interaction of committee members or a subgroup of committee members who are authorized to conduct business on behalf of the full committee. We feel that this reformulation would also address the problem of so-called "executive committees," where perhaps the chairman, the vice chair, or two or three other members come together representing a very small proportion of the full committee membership, but where they have authority to act—and that is the important consideration here, that is, when these meetings need to be open. We suggest that for your consideration.

The Select Committee is also concerned about the definition of the term "subcommittee" in section 3(3). The phrase, "whether or not its members are drawn from the parent committee" could be interpreted to encourage tacitly the membership in a subgroup of persons who are not on the parent committee. Although this may be appropriate in certain exceptional circumstances, the Select Committee suggests that the phrase be deleted. We simply do not want to be encouraging committees to be composed of people who are not in the public eye.

Lastly, I would like to offer a suggestion or bring to your attention some wisdom about one-time meetings. The Committee's Vice Chairman, former law professor Michael Cardozo, who has testified before this Committee, has prepared a comprehensive report to the Administrative Conference of the United States, which took the position:

"Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that FACA is not applicable to ad hoc, unstructured, noncontinuing groups, and that GSA's guidelines should make this clear."

I would like to add one more thought. We have heard a lot of comment about the job that GSA has been doing here. I have been studying the advisory committee process since 1980, and I have seen drastic changes, for the good, in the way that the review committee system is managed. Certainly, there are areas that could be addressed and will be addressed, more staff attention and so forth, but I would like to share with you an insight.

Just this year, GSA held the first annual meeting of Federal advisory committee experts, committee management officers and others in conjunction with the Federal Bar Association and the Administrative Conference. It was the first of many to come. It is an indication, I think, that GSA has raised the level of visibility about management concerns, which is all to the good, and I salute them.

I do feel that many of the concerns this Committee has heard today could be addressed by regulation. I would like to ask that the Administrative Conference report be considered for inclusion in the record, the one that I spoke about. Also, I think it would be helpful if the Committee would consider including a comprehensive catalog of FACA cases prepared by Miriam Miller for the Federal Bar Select Committee. I see this as an opportunity to bring together in one place much of the learning on FACA.

I thank you very much.

Chairman GLENN. If you could submit those, we will have the Committee staff look at them and see whether we want to include them or not.

Mr. MURPHY. Thank you, Mr. Chairman.

Chairman GLENN. Thank you very much.

Ms. Fede?

Ms. FEDE. Mr. Chairman, I thank you for the opportunity to testify this morning. I will shorten my remarks somewhat.

I am testifying as a private citizen, serving as President of the Federal Advisory Committee Management Association, which is a group of professional committee management officers from 60 Federal agencies who deal with the management and oversight of advisory committees.

I commend the Committee for your efforts to clarify the Act, and I appreciate your receptiveness to our earlier comments. The Federal Advisory Committee Act has served us well, but its language is broad and its provisions have been subject to various administrative and judicial interpretations. In fact, even today, after 16 years, agency compliance is sincere but not uniform, because agencies differ in interpreting specific provisions of the Act.

The proposed amendment will focus on some troublesome aspects of FACA, such as coverage, balance, and conflict of interest questions. It will also give agencies a mechanism for terminating statutory committees which have outlived their usefulness. However, several provisions of the amendment continue to concern the advisory committee community, and I would like to focus more closely on those provisions.

Section 2(b)(8) of the Act, as amended, would require that to the greatest extent practicable, an advisory committee should conduct all business through meetings. Hopefully, this will not eliminate the use of conference calls or materials mailed out for comment, since they can save an agency travel and per diem costs. Some agencies are under tight congressional ceiling restrictions and must seek to save costs where possible. Perhaps having conference call summaries and comments received from the members available to the public could alleviate this restrictions.

The amendment, as written, will alter the advisory committee community's general understanding that all formal subcommittee meetings must comply with the openness and public access provisions of FACA. Most agencies publish notice of formal subcommittee meetings in the Federal Register and the public may attend. Under the amendment, as I understand it, only subcommittees which render advice directly to a Federal agency will be required to comply with these provisions.

Since one of the goals of FACA is openness and public access, then I feel a more consistent approach would be to announce all formal subcommittee meetings in the Federal Register and open them to the public. A great deal of substantive work is done in such sessions. In fact, in very large committees, virtually all substantive work is done at the subcommittee level. The full committee or executive committee simply ratifies their recommendations and forwards them to the agency.

I would suggest that such coverage should extend only to formal subcommittee meetings and not to informal research, data gathering and drafting sessions, or site visits. These objectives are accomplished under the current wording of FACA and are further clarified by GSA regulations. I recommend retaining the current language of FACA.

This brings me to a concern over the amendment's definition of a meeting as "any action between a majority of committee members." As has been expressed earlier in testimony, this would exclude formal subcommittee sessions, and it appears also to exclude executive committee sessions. In large committees, it is common for the chairmen of the subcommittees to comprise an executive committee. It does not necessarily constitute a majority of committee members, but the executive committee receives and ratifies the advice of the subcommittees and passes the advice to the agency.

Because executive committee sessions would not be considered a meeting under the amendment's definition, they would also be exempt from the openness and public access provisions of FACA. Under these terms, large committees which meet in subcommittee and executive sessions would never actually hold a "meeting." They could not render advice to an agency, because this requires a "meeting." Under the amendment, such committees would be required to hold general membership meetings, and for committees of 150 or 200 members, this would be extremely costly to the Federal Government.

Perhaps the dilemma could be resolved if the definition of a meeting were broadened to include formal substantive sessions of subgroups or subcommittees, as well as executive committee sessions, whether or not a majority is present, if their purpose is to act on behalf of the full committee.

Another option would be to leave the precise definition to GSA regulation. The final Rule on Advisory Committee Management—published December 2, 1987—gives adequate guidance, not by defining these terms, but by defining what types of interactions are exempt from coverage.

Committee management officers favor the establishment of uniform guidelines regarding ethics and conflict of interest matters for advisory committee members. However, there appears to be an internal inconsistency in the amendment's treatment of financial disclosure.

As has been discussed by other witnesses, the amendment states in section 6(b)(4) that agency heads shall determine whether members are to be appointed as special government employees or as representatives of nonFederal interest groups. It is the opinion of the Office of Government Ethics that members serving in a representational capacity need not complete disclosure forms. Yet, section 10(c)(5) requires that all prospective members shall be subject to financial disclosure prior to their appointment.

The amendment does not specify whether these public financial disclosure statements would be available to the public, and this needs to be clarified. I do not know what impact public financial disclosure would have on a person's willingness to serve. It would certainly have a chilling impact if they were required to state a full disclosure of financial assets. Several agencies presently require all potential members to complete a short form listing assets and affiliations which might cause a conflict, but the forms are not available to the public.

In addition, I question whether we should impose disclosure requirements on outside, preexisting groups which may be utilized by a Federal agency for advice. The requirement would be burdensome and unnecessary, because the government solicits their advice as representational groups, not as individuals. The members are not appointed by agency officials, and I would suspect that we might lose the advice from such groups if they were required to comply with the financial disclosure aspects of the amendment.

Two final concerns are the annual report requirement and the records management provisions of the proposed amendment. The

President's Annual Report to the Congress is a most useful document, and I would strongly urge that agencies continue to submit data to GSA for one comprehensive annual report. Separate reports to the Congress from approximately 66 agencies would require significant additional staff time and preparation costs and they would provide no common source of reference and comparison for government officials or the public.

Reports to Congress have to be cleared throughout each agency. Since agencies historically have a propensity to be late with reports to Congress, this could hinder GSA in its efforts to put together a summary report. The comprehensive report is our only source of government-wide information on advisory committees. It is well prepared and is used by agency managers as a reference for committee information and statistics. I recommend it be continued in its present format.

Members of the advisory committee community are in complete agreement that records management should be defined by GSA regulation, using National Archives and Record Administration guidelines, rather than by statute.

In summary, I am pleased that the Senate Governmental Affairs Committee is exercising its oversight function with attention to the Federal Advisory Committee Act. I hope these comments on the proposed amendment will be helpful, and I will be pleased to work with the Committee staff in further clarifying the areas I have mentioned in my testimony.

Thank you.

Chairman GLENN. Thank you very much, Ms. Fede.

Mr. Glitzenstein, Public Citizen Litigation Group. Mr. Glitzenstein, we welcome either a summarized version, we hope, or a lengthy version, but the longer version will be included in the record. I have another meeting before too long and I am not going to be able to ask questions after you finish. We are going to have to submit those to you, because I do have a previous commitment I am going to have to go to. I am sorry that we have a rather truncated hearing this morning, but that is the way it is.

Mr. GLITZENSTEIN. Thank you, Senator. I will be extremely brief. Partially, I can be brief because I agree with much of what has been said on this panel meeting and much of what has been said here today. I think that pinpoints why this hearing is so appropriate and necessary and why it is very important to embark on the analysis and revamping of the Advisory Committee Act.

It also brings home to me that we do have consensus now on what the problem areas are, which I think is one important step to take. I think we also have a great deal of consensus on how to begin solving those problems.

One thing that has not been brought out is that Brian, myself, and Roberta are all on the FBA Advisory Committee, which discusses these kinds of issues, and I think one thing that we have realized is that reasonable minds can differ on Advisory Committee Act issues, just as they can differ on anything else.

I think the other thing we have realized, as some of the discussion of subcommittees and meetings and balanced representation bring home, is that when people from the public interest community sit down with people from the agencies, there is a way of arriving at a consensus on a lot of these issues.

With that in mind, if I could just make one or two very, very quick points about some of these problem areas: I think with respect to the meetings question and the subcommittee question, I really am in wholehearted agreement with Brian and Roberta.

As the statute currently deals with these issues, there is, some vagueness, but at least with respect to the meetings question, the adage "if it ain't broke, don't fix it" applies. Quite frankly, Senator, there has been very little litigation on the meetings question. I think there has been a problem with respect to the coverage of subcommittees, and the kind of approach that Brian has suggested is a useful way of trying to get a handle on the kind of subcommittees that should be covered under this statute.

If you exclude all subcommittees except those which report directly to Federal officials, as the proposed legislation does, you are really opening the door to a massive loophole in the statute, because any executive committee can simply assign or delegate all of its work to formal subcommittees which can then do all of the work of the advisory body, and simply rubber stamp the work of the committee I think that really presents serious problems.

The other issue that I would like to touch on very briefly is the balance question, which you alluded to, Senator Glenn, I think for good reason. It does present massive conceptual difficulties. I think the approach that is suggested in the amendment is a useful one in the sense of trying to get at some additional legislative guidance, specifically, for example, by indicating that directly affected groups should have some representation on the committee.

I disagree with the representative of OMB on that point. It is important to provide some additional legislative guidance which then can be fleshed out to some greater degree by the General Services Administration. It is also important, though, to insure that there is a continuing enforceable obligation so that those who represent the public interest in various respects can go to court and enforce that obligation, and I think that there are better ways of wording that kind of an enforceable obligation than is proposed in the amendment, and I would look forward to discussing that additionally in the future.

It is interesting that you used the pesticide example previously. that is a committee which is totally stacked by industry representatives, because we are currently litigating a case which suggests that that is not simply a figment of fiction. We have a case against something called the Microbiological Committee, which has been established by the Department of Health and Human Services and USDA, and is supposed to do something very important, which is establish criteria for microbiological contaminants in foods.

Every one of the nongovernmental representatives on that committee, 11 in all, are either direct representatives of industry, consultants of industry, or have done contracting for industry. It is a good example that we have ongoing balance problems and we have to figure out some way of getting at those problems.

Finally, let me briefly touch on the conflict of interest question. I agree with Brian's point that, to some degree the conflict of interest question is partially a balance question also. If you want to go out and get an industry representative, then that is something that a committee should be permitted to do, as long as it insures that it has a public representative on the other side of the fence.

I think it is also clear that if you have the kinds of sensible and limited disclosure forms that everyone here is talking about, then public access to those forms is a adjunct or useful companion to that. The representative from GSA previously suggested that if you have comprehensive, voluminous financial disclosure, no one is going to want to serve on a committee, but that kind of disclosure is not necessary.

What is necessary is an abbreviated disclosure form which simply relates to service on the specific committee involved, and I believe strongly—and I think that there are those are in the government who also share this point of view—that if you draw up a sensible, abbreviated disclosure form which focuses only on advisory committee service, then public disclosure can be an extremely important adjunct and would not deter public service.

I think those are the most important issues that we have been talking about today, and I and my organization look forward to working with this Committee in the future to deal with some of those questions.

Thank you.

Chairman GLENN. Thank you all very much, and I am sorry we went so long today, because we do have a number of questions we did not have time for, which we will submit to you.

Mr. Glitzenstein, I want to submit a question to you about the implications of your current appeal to the Supreme Court over the Bar Association's Select Committee on the Federal Judiciary, what impact that may have on FACA. I wanted to get comments from all of you on the idea that potential advisory committee members could "directly approach an agency's advisory committee management officer with questions or concerns about the operation of the committee." I was very surprised we were not doing this now. It seems to me that is rather fundamental. I think putting out information in advance may help that.

Whether the applicability of Federal laws have really a chilling effect, what your experience has been on that, about people willing to serve; what should go out in a letter, should there be an official letter of request to serve which explicitly states some of those things we talked about earlier, I would like to get your opinion on these notions and some of the different advice we received, and I will not have time to do it right now but we will get a letter out to you on some of those things. We hope you would respond and that will be included in our record of the hearing today.

We appreciate your willingness to be here so long this morning with us. Thank you all very much, and the Committee will stand in recess subject to call of the Chair.

[Whereupon, at 12:30 p.m., the Committee recessed subject to call of the Chair.]

APPENDIX

100th CONGRESS
2d Session

S. 2721

To amend the Federal Advisory Committee Act.

IN THE SENATE OF THE UNITED STATES

August 10, 1988

Mr. **Glenn** (for himself, Mr. **Levin**, Mr. **Roth**, Mr. **Pryor**, Mr. **Stevens**, and Mr. **Chiles**) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To amend the Federal Advisory Committee Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Advisory Committee Act Amendments of 1988".

REFERENCES

Sec. 2. All references in this Act are to the Federal Advisory Committee Act (5 U.S.C. App. 2), unless otherwise provided.

FINDINGS AND PURPOSES

Sec. 3. Section 2(b) of the Act is amended—

(1) in paragraph (1) by amending such paragraph to read as follows:

"(1) the need for each existing advisory committee should be periodically reviewed;";

(2) in paragraph (2) by inserting after "essential" the following: "and only when the information to be obtained is not already available through another advisory committee or source within the Federal Government,";

(3) in paragraph (4) by inserting "utilization," after "establishment,";

(4) by redesignating paragraphs (5) and (6) as paragraphs (7) and (8), respectively, and inserting after paragraph (4) the following new paragraphs:

"(5) the composition of any such committee should be balanced in membership in terms of the points of view represented and the functions to be performed by the advisory committee, with emphasis given to obtaining representation of interests which will be directly affected by the work of the committee and to obtaining expertise relevant to the work of the committee;

"(6) all matters to be considered by a committee should be clearly delineated in the charter of such committee";

(5) in paragraph (7) (as redesignated by paragraph (4) of this section) by striking out "and" after the semicolon;

(6) in paragraph (8) (as redesignated by paragraph (4) of this section) by—

(A) striking out "only"; and

(B) striking out the period and inserting in lieu thereof a semicolon and "and"; and

(7) by adding at the end thereof the following new paragraph:

"(9) to the greatest extent practicable, an advisory committee should conduct all business furthering the mandate of the committee through meetings.".

DEFINITIONS

SEC. 4. Section 3 of the Act is amended—

(1) in paragraph (2)—

(A) in subparagraph (A) by striking out "by statute or reorganization plan, or" and inserting in lieu thereof "pursuant to statutory direction or authorization;"

(B) in subparagraph (B) by striking out the comma and inserting in lieu thereof a semicolon; and

(C) by striking out the matter following subparagraph (C) and inserting in lieu thereof:

"in the interest of obtaining collective advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes—

"(i) the Advisory Commission on Intergovernmental Relations;

"(ii) any committee established or utilized by the Central Intelligence Agency;

"(iii) any committee established or utilized by the Federal Reserve System;

"(iv) any committee which is composed wholly of full-time officers or employees of the Federal Government;

"(v) any local civic group whose primary function is that of rendering a public service with respect to a Federal program; and

"(vi) any State or local committee established to advise or make recommendations to State or local officials or agencies."; and

(2) by redesignating paragraphs (3) and (4) as paragraphs (6) and (7), respectively, and inserting after paragraph (2) the following new paragraphs:

"(3) The term "subcommittee or subgroup" as used in paragraph (2) means any group established by a committee (regardless of whether any members of such subcommittee or subgroup are also members of the parent committee) that provides collective advice or recommendations directly to an agency or Federal official.

"(4) The term "operational function" means committee actions taken to implement Federal policy, rather than to develop or provide advice concerning such Federal policy.

"(5) The term "meeting" includes any interaction between—

"(A) a majority of advisory committee members at which the substantive business of the committee is discussed; or

"(B) any members of a subcommittee or subgroup for purposes described in paragraph (3).".

PROHIBITIONS AND APPLICABILITY

SEC. 5. Section 4 of the Act is amended to read as follows:

"PROHIBITIONS AND APPLICABILITY

"SEC. 4. (a) No advisory committee shall be established or utilized by the United States, unless the establishment or utilization is—

"(1) specifically authorized or directed by statute or directed ~~by~~ the President; or

"(2) specifically determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, to be in the public interest in connection with the performance of duties imposed on that agency by law.

"(b) No advisory committee shall meet or take any action until a committee charter has been filed in accordance with section 7.

"(c) The function of advisory committees shall be advisory only, unless otherwise specifically provided by a statute, Presidential directive, or agency directive which is a matter of formal record. If a statute, Presidential directive or agency directive specifically provides for operational functions in addition to advisory functions, the statute or directive shall also state whether the committee is subject to this Act. An advisory committee with operational functions shall be subject to this Act, if it is primarily advisory in nature as determined by the involved agency after consultation with the Administrator. Agencies shall identify in any annual reports under section 10(d) any advisory committees which also have operational functions.".

ESTABLISHMENT OF ADVISORY COMMITTEES BY CONGRESS

SEC. 6. Section 5 of the Act is amended—

(1) by amending the section heading to read as follows:

"ESTABLISHMENT OF ADVISORY COMMITTEES BY CONGRESS";

(2) by amending subsection (a) to read as follows:

"(a) Congress may establish or direct the President or an agency to establish or utilize an advisory committee.";

(3) in subsection (b)—

(A) in the first sentence by—

(i) striking out "In" and inserting in lieu thereof "When";

(ii) striking out "each standing committee" and inserting in lieu thereof "a Committee";

(iii) striking out "determine" and inserting in lieu thereof "consider"; and

(iv) striking out "such determination";

(B) in paragraph (1) by inserting "and detailed" after "defined";

(C) in paragraph (2) by striking out "functions to be performed by the advisory committee;" and inserting in lieu thereof "committee functions to be performed by the advisory committee, and shall prescribe the factors to be considered in achieving balanced membership;";

(D) in paragraph (3) by striking out "appropriate"; and

(E) by striking out paragraphs (4) and (5) and inserting in lieu thereof the following new paragraphs:

"(4) indicate whether members of the committee shall—

"(A) be appointed as Federal employees; or

"(B) represent the views of non-Federal organizations or interests;

"(5) contain provisions dealing with authorization of appropriations, the duration of the advisory committee, and dates for the completion and publication of any reports; and

"(6) contain provisions to assure that the advisory committee shall have adequate staff, quarters, and funds to meet necessary expenses."; and

(4) by striking out subsection (c).

RESPONSIBILITIES AND ADVISORY COMMITTEE PROCEDURES

SEC. 7. The Act is amended by—

(1) striking out section 15;

(2) redesignating sections 12 through 14 as sections 14 through 16, respectively; and

(3) striking out sections 6 through 11 and inserting in lieu thereof the following new sections:

"ESTABLISHMENT OF ADVISORY COMMITTEES BY PRESIDENT OR AGENCY

"SEC. 6. (a) The President or an agency head may establish or utilize an advisory committee pursuant to a statute, Presidential directive, or agency directive. Any agency directive shall be a matter of formal record, subsequent to consultation with the Administrator.

"(b) When considering establishing or utilizing any advisory committee the President or agency head shall consider whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee in existence, or by enlarging the mandate of an existing advisory committee. At the time any advisory committee is first established or utilized, the President or agency head shall make a determination in writing which shall—

"(1) contain a clearly defined and detailed purpose for the advisory committee;

"(2) contain provisions to assure that—

"(A) the membership of the committee shall be fairly balanced in terms of the points of view represented and the committee functions to be performed; and

"(B) shall prescribe the factors to be considered in achieving balanced membership;

(3) contain provisions to assure that the advice and recommendations of the advisory committee shall not be inappropriately influenced by the appointing authority or by any special interest, but shall be the

result of the independent judgment of the advisory committee;

"(4) indicate whether members of the committee shall—

"(A) be appointed as Federal employees; or

"(B) represent the views of non-Federal organizations or interests;

"(5) contain provisions dealing with authorization of appropriations, the duration of the committee, and dates for the completion and publication of any reports; and

"(6) contain provisions to assure that the advisory committee shall have adequate staff, quarters, and funds to meet necessary expenses.

"(c) The information required under this section shall be in—

"(1) the Presidential directive in the case of an advisory committee established or utilized by the President; or

"(2) a timely notice published in the Federal Register in the case of advisory committees established or utilized by an agency.

"CHARTERING OF ADVISORY COMMITTEES

"SEC. 7. (a) The charter of an advisory committee shall contain at least the following information:

"(1) the name of the committee;

"(2) whether the committee is—

"(A) authorized or established by statute;

"(B) established by the President; or

"(C) established as a matter of formal record by the head of the agency involved;

"(3)(A) the date the charter is filed;

"(B) whether such charter is an original charter or a renewal; and

"(C) if a renewal charter, the date when the committee was first chartered;

"(4)(A) the agency responsible for providing support services to the committee;

"(B) the name of the advisory committee management officer of such agency under section 10(c); and

"(C) the name of the designated Federal official for the committee under section 10(c);

"(5)(A) a clear and detailed explanation of the purpose, objectives, duties, and scope of activity of the committee; and

"(B) if such committee has operational as well as advisory functions, the authority for performing such operational functions;

"(6) the plan for achieving a balance in committee membership in terms of the points of view represented and committee functions to be performed;

"(7) whether committee members are to serve as Federal employees, representatives of non-Federal interests or some combination of the two, and whether such members shall be subject to Federal ethics rules and criminal conflict of interest statutes;

"(8) the estimated number and frequency of committee meetings and the estimated total period of time necessary for the committee to complete all tasks;

"(9) the estimated annual operating costs in dollars and person-years for such committee; and

"(10) the termination date of the committee if no renewal charter is filed.

"(b) For each advisory committee, a charter in accordance with this section shall be filed with—

"(1) the Administrator;

"(2) the head of the agency which established or provides support services for such advisory committee; and

"(3) the standing committees, in the Senate and the House of Representatives, having jurisdiction over such advisory committee.

"RESPONSIBILITIES OF CONGRESSIONAL COMMITTEES

"SEC. 8. In the exercise of its legislative and oversight functions, each standing committee of the Senate and the House of Representatives may review the activities of each advisory committee under the jurisdiction of each such committee to determine whether—

"(1) such advisory committee should be terminated or merged with any other advisory committee;

"(2) the responsibilities of such advisory committee should be revised; and

"(3) such advisory committee performs a necessary function not already being performed.

"ADDITIONAL RESPONSIBILITIES OF THE PRESIDENT

"SEC. 9. (a) Within one year after the date on which a Presidential advisory committee submits formal recommendations to the President, the President or a delegate shall submit a report to the Congress describing either proposals for action or reasons for inaction, with respect to such recommendations.

"(b) The President shall ensure that committee charters required by this Act are filed in a timely manner.

"(c)(1) No later than February 1 of each year, the President shall make an annual summary report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall be a summary of information contained in the annual report of each agency which established or utilized an advisory committee during that period. The summary report shall include—

"(A) the name of every advisory committee and the total estimated annual cost to the United States to fund, service, supply, and maintain such committees;

"(B) a summary and analysis of data regarding the establishment and termination of advisory committees;

"(C) whether such committees are ad hoc or standing committees;

"(D) the membership of such committees;

"(E) the frequency and openness of meetings;

"(F) the number of reports submitted;

"(G) any issues of concern in the functioning of such committees or this Act; and

"(H) a list of the advisory committees terminated by the President or an agency during the preceding year.

"(2) The President may exclude from the annual summary report any information which the President determines should be withheld for reasons of national security, and in lieu thereof shall include in such report a statement that such information has been excluded.

"ADDITIONAL RESPONSIBILITIES OF AGENCY HEADS

"SEC. 10. (a)(1) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established or utilized by such agency, which shall be consistent with any rule, order, or regulation of the Administrator under sections 11 and 12.

"(2) Each agency head shall conduct periodic reviews of committees or other groups established or utilized by the agency to determine whether any are advisory committees subject to this Act and, if so, to bring such committees into compliance with the requirements of this Act.

"(b) Each agency shall maintain systematic information on—

"(1) the nature, functions, and operations of each advisory committee within the jurisdiction of the agency; and

"(2) agency compliance with this Act and the rules of the agency for advisory committees.

"(c) The agency head shall—

"(1) designate an Advisory Committee Management Officer for the agency;

"(2) comply with section 6 in establishing or utilizing any advisory committee;

"(3) file a charter in accordance with section 7 of this Act for each advisory committee—

"(A) which is established or utilized by the agency;

"(B) for which the agency provides support services; or

"(C) for which an officer or employee of the agency acts as the Designated Federal Official for the committee;

"(4) appoint a Designated Federal Official for each advisory committee;

"(5) require prospective members of a committee, before appointment or participation in any committee meeting or work, to—

"(A) disclose in writing any financial or other interest which may—

"(i) be affected by the work of the committee; or

"(ii) create the appearance of a conflict of interest; and

"(B) resolve with the agency ethics official, any such conflict of interest or other possible ethical problem;

"(6) publish timely notice of committee meetings in the Federal Register, oversee timely completion of detailed committee minutes and otherwise oversee committee compliance with the procedures in section 12; and

"(7) terminate advisory committees when appropriate.

"(d)(1) No later than December 1 of each year, the head of each agency which establishes, utilizes, or supports an advisory committee shall make an annual report to the Congress on the activities, status, and changes in the composition of such advisory committees during the preceding fiscal year.

"(2) The agency head shall follow guidelines set forth by the Administrator for the annual report by the agency head.

"(3) The report shall include—

"(A) the name of each advisory committee which the agency has established, utilized, or supported during the year;

"(B) the date of establishment and expected termination of each committee;

"(C) whether such committee is an ad hoc or standing committee;

"(D) the date any significant report has been filed or is due to be filed;

"(E) functions of each such committee;

"(F) the dates of meetings of each such committee during the preceding year;

"(G) the names and occupations of the current members;

"(H) the total estimated annual cost to the United States to fund, service, supply, and maintain each such committee;

"(I) a list of the advisory committees terminated by the agency head during the preceding year; and

"(J) any issues of concern in the functioning of such committees or this Act.

"(4) The agency head may exclude from the annual report any information which such agency head determines should be withheld for reasons of national security, and in lieu thereof shall include in such report a statement that such information has been excluded. A copy of the report shall be submitted to the Administrator and the President.

"(e) Each advisory committee management officer shall—

"(1) exercise control and supervision over the establishment, operation, and termination of advisory committees established, supported, or utilized by that agency;

"(2) assemble and maintain the reports, records, and other papers of any such committee during existence of the committee;

"(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers;

"(4) carry out, on behalf of the agency, the provisions of section 552a of title 5, United States Code, with respect to meetings of the committee, including supervising the designated federal official;

"(5) oversee and provide counseling on ethics issues and financial disclosure obligations;

"(6) maintain in a single location a complete set of the charters and membership lists of each of the advisory committees of such agency;

"(7) maintain information on the nature, functions, and operations of the advisory committees of such agency; and

"(8) provide upon request copies of minutes of meetings and reports of the advisory committees of such agencies.

"RESPONSIBILITIES OF THE ADMINISTRATOR OF GENERAL SERVICES

"SEC. 11. (a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

"(b)(1) The Administrator shall—

"(A) prescribe administrative guidelines and management controls applicable to advisory committees;

"(B) to the maximum extent feasible, provide advice, assistance, and guidance to agencies, the advisory committees of agencies, and committee members;

"(C) establish guidelines for the annual report required of each agency under section 10(d); and

"(D) review committees or other groups established or utilized by an agency to determine if any are advisory committees subject to this Act and, if so, to bring such committees into compliance with the requirements of this Act.

"(2) In carrying out the functions under this subsection, the Administrator shall consult with the agencies that have established or regularly utilized advisory committees.

"(c)(1) The Administrator shall periodically conduct a comprehensive review of each existing advisory committee to determine whether—

"(A) such committee is carrying out its purpose;

"(B) consistent with the provisions of applicable statutes, the responsibilities assigned to the committee should be revised;

"(C) such committee should be merged with other advisory committees; or

"(D) such committee should be terminated.

"(2) The Administrator may from time to time request such information as the Administrator determines necessary to carry out the functions under this subsection. Each agency head shall cooperate by providing such information to the Administrator. Upon the completion of a review, the Administrator may make recommendations to the President, an agency head, or the Congress with respect to any action that should be taken.

"(d)(1) The Administrator shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

"(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

"(B) such members, while engaged in the performance of duties away from homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in government service, and

"(C) services may be provided pursuant to section 3102 of title 5, United States Code, for members while in performance of advisory committee duties who—

"(i) are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)); and

"(ii) do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title).

"(2) Nothing in this subsection shall prevent—

"(A) an individual who (without regard to service with an advisory committee) is a full-time employee of the United States; or

"(B) an individual who immediately before service with an advisory committee was such an employee,

from receiving compensation at the rate at which such individual otherwise would be compensated (or was compensated) as a full-time employee of the United States.

"(e) If there is disagreement between the Administrator and the President or an agency head regarding the establishment, management, or termination of advisory committees, the President or agency head shall have final authority, but a notice of the areas of such disagreement shall—

"(1) in the case of establishment, be placed in the charter; or

"(2) in the case of management or termination, be placed in the annual summary report to the Congress.

"(f) The Administrator shall include in budget recommendations a summary of the amounts the Administrator determines necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

"ADVISORY COMMITTEE PROCEDURES

"SEC. 12. (a)(1) Each advisory committee meeting shall be open to the public.

"(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

"(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe. The agency head or, in the case of an independent Presidential advisory committee, the Administrator, shall ensure that—

"(A) each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

"(B) the meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public; and

"(C) any member of the public is permitted to file a written statement with the advisory committee.

"(b) An advisory committee may not report advice or recommendations to any Federal official without first holding a meeting at which a majority of the committee members approve the advice or recommendations to be reported.

"(c)(1) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying—

"(A) at the time any such records and documents are distributed to the advisory committee; and

"(B) at a single location in the offices of the advisory committee or the agency to which the advisory committee reports.

"(2) Such records and documents shall be available for public inspection and copying—

"(A) at a single location in the headquarters of the agency which chartered or provided support services to the advisory committee during the existence of the advisory committee; and

"(B) for at least one year after the committee ceases to exist.

"(3) In the case of Presidential advisory committees whose charters are not filed by an agency head, such records and documents shall be transmitted to the office of the Administrator and made available for public inspection and copying by that agency during the existence of the advisory committee and for at least one year after the committee ceases to exist.

"(d) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified by the chairman of the advisory committee within forty-five days after the meeting.

"(e)(1) Subsections (a) (1) and (3) of this section shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552b of title 5, United States Code.

"(2)(A) No advisory committee meeting may be closed, unless such meeting is closed under the provisions of this paragraph.

"(B) To close all or part of a meeting, a duly authorized official acting on behalf of the committee shall submit a request to the agency head, or in the case of an independent Presidential advisory committee, the Administrator, citing the specific provisions of section 552b of title 5, United States Code, which justify the closure. The request shall provide the agency head or Administrator sufficient time to make a determination prior to the publication of the required meeting notice.

"(C) If the agency head, or in the case of an independent Presidential advisory committee, the Administrator, determines that the request is consistent with applicable law—

"(i) such agency head or Administrator shall issue a determination that all or part of the meeting may be closed; and

"(ii) the agency head, or the chairperson of an independent Presidential advisory committee, shall—

"(I) make a copy of the determination available to the public upon request; and

"(II) publish the meeting notice in the Federal Register, including the reasons that all or part of the meeting is closed, citing the specific exemptions used under subsection (c) of section 552b of title 5, United States Code.

"(f) The designated Federal official named under section 10(c)(3) shall attend the meetings of the advisory committee and is authorized to—

"(1) adjourn the meetings when such office determines that adjournment is in the public interest; and

"(2) for advisory committees established or utilized by the agency—

"(A) approve the agenda of the meeting;

"(B) open the meeting; and

"(C) chair the meeting when so determined by the agency head.

"(g) No advisory committee may conduct any meeting in the absence of the designated Federal official.

"AVAILABILITY OF TRANSCRIPTS

"SEC. 13. (a) Agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts and minutes of agency proceedings or advisory committee meetings.

"(b) As used in this section 'agency proceeding' means any proceeding as defined in section 551(12) of title 5, United States Code.".

ADMINISTRATIVE PROVISIONS

SEC. 8. Section 14 of the Act (as redesignated by section 7(1) of this Act) is amended—

(1) in the third sentence of subsection (b) by striking out "may" and inserting in lieu thereof "shall"; and

(2) by adding at the end thereof the following new subsection:

"(c) For purposes of this section, the term 'support services' means the provision of office space, telephone and computer service, and other administrative or clerical services that the advisory committee may need.".

TERMINATION OF ADVISORY COMMITTEES

SEC. 9. Section 16 of the Act (as redesignated by section 7(1) of this Act) is amended—

(1) in subsection (a) by—

(A) striking out paragraph (1);

(B) by redesignating paragraph (2) as subsection (a) and redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(C) striking out "established after such effective date" in the first sentence of subsection (a) (as redesignated in subparagraph (B) of this paragraph); and

(D) inserting "or utilized" after "established" in paragraph (1) (as redesignated in subparagraph (B) of this paragraph); and

(2) by amending subsections (b) and (c) to read as follows:

"(b)(1) The President or an agency head may terminate an advisory committee before the statutory termination date, after giving ninety days notice of the intention to terminate to the establishing or authorizing committees in each House of the Congress, if the President or an agency head determines that—

"(A) the tasks assigned to a committee established by statute are complete or obsolete;

"(B) the primary functions of the committee have been assumed by another entity; or

"(C) the termination of the committee is otherwise in the public interest.

"(2) If the Congress determines that the committee is necessary, the Congress may reauthorize it within the ninety-day period.

"(c)(1) To renew an advisory committee, the President or an agency head shall file, before the date of the scheduled termination of the committee, a new committee charter in accordance with section 7.

"(2) An advisory committee may be renewed for a period not to exceed 2 years from the date a new charter is filed.

"(3) Subsequent renewals may be achieved in the same manner before the date on which such advisory committee would otherwise terminate.".

United States General Accounting Office

GAO

Testimony

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Federal Advisory Committees: GSA's Management Oversight and GAO Comments on Proposed Legislative Amendments (S. 2721)

Statement of
Rosslyn S. Kleeman,
Senior Associate Director
General Government Division

Before the
Committee on Governmental Affairs
United States Senate

GAO/T-GGD-89

FEDERAL ADVISORY COMMITTEES: GSA'S MANAGEMENT OVERSIGHT AND GAO COMMENTS ON PROPOSED LEGISLATIVE AMENDMENTS (S. 2721)

Summary of Statement by
Rosslyn S. Kleeman,
Senior Associate Director
General Government Division

When enacting the Federal Advisory Committee Act in 1972, Congress recognized that, properly organized and managed, advisory committees can provide an appropriate and useful source of information in the public policymaking process. During fiscal year 1987, about 1,000 advisory committees were in operation.

GSA has a role in assuring, from a governmentwide perspective, that federal agencies organize, operate, and terminate advisory committees in accordance with the act. GAO found that GSA had not carried out all of its responsibilities. For example, GSA had not

- -- made required annual comprehensive reviews of advisory committee activities, or
- -- prepared required reports on the status of recommendations made by Presidential advisory committees.

GSA cited a variety of reasons for not having fully executed its advisory committee responsibilities but believes that it now has the staff capability necessary to accomplish the functions in the future.

S. 2721 contains provisions which GAO believes can strengthen GSA's role in managing advisory committees governmentwide. In general, GAO's reviews of advisory committee activities support the need for the amendments, with some modifications, proposed in S. 2721.

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to appear before the Committee to discuss our findings on how well the General Services Administration has carried out its responsibilities under the Federal Advisory Committee Act (FACA). At the Committee's request, we recently completed a review of GSA's management of advisory committee activities, and we have made other reviews of specific advisory committees' operations.

You also asked for our views on the Federal Advisory Committee Amendments Act (S. 2721). My statement contains several comments and suggestions on the proposed amendments that our work suggests may be appropriate for the Committee to consider.

Congress has recognized that, when properly organized and managed, advisory committees can provide a useful source of expertise and advice. When enacting FACA in 1972, however, Congress expressed its concern about the proliferation and lack of effective management of advisory committees. More than 1,400 advisory committees existed in 1972. The number dropped to about 1,000 in 1979 and has since remained at approximately that level. Fifty-seven departments and agencies use and/or support advisory committees, and two departments (Health and Human Services and Interior) accounted for 425 (43 percent) of the 992 committees in existence during fiscal year 1987.

FACA established a Committee Management Secretariat, now located in GSA, to oversee advisory committee activities. We found that functions assigned to the Secretariat, such as making comprehensive annual reviews of committee activities and describing the actions taken in response to recommendations by Presidential advisory committees, have not been accomplished. GSA cited a variety of reasons for not fully implementing its FACA responsibilities, but said that it will do so in the future. S. 2721 contains provisions which we believe will help strengthen the management of advisory committees governmentwide and will appropriately clarify and supplement many FACA provisions.

ADVISORY COMMITTEE MANAGEMENT

Our report on GSA's performance in executing its FACA responsibilities is being released today. I request the Committee's permission to have the report, in its entirety, made a part of the hearing record, and I will highlight our principal findings.

Let me first put into perspective GSA's role in administering FACA. Under FACA, the ultimate responsibility for creating, reviewing, and terminating an advisory committee rests with the authority that perceived the need to establish the committee. This could be the President, an agency head, or Congress. GSA reviews all charters for advisory committees proposed to be established by agencies and receives copies of charters for advisory committees that are created by statute and Presidential order. When an agency head proposes to establish an advisory committee, FACA requires that GSA be consulted. GSA shares its views with the agency involved, but the agency head has the final authority for creating the advisory committee.

Along with its consultation role, the Committee Management Secretariat in GSA is responsible for

-- providing the agencies with uniform guidance on advisory committee activities,

-- making comprehensive annual reviews of each committee's activities and recommending to the President, the agency head involved, and/or Congress any actions the GSA Administrator deems appropriate,

-- preparing for the President annual reports to Congress on the activities, status, and changes in the composition of advisory committees, and

-- preparing follow-up reports on the status of recommendations made by Presidential advisory committees.

GSA's Secretariat had focused its attention primarily on consulting with agencies and preparing the President's annual report. It assigned a lower priority to accomplishing the other functions.

Specifically, GSA had not made comprehensive reviews of advisory committees to determine, among other things, whether unneeded committees exist and whether GSA should recommend to Congress, the President, and agency heads that such committees be abolished. Rather, GSA had relied on the agencies responsible for advisory committees to report on the need for them. The reports submitted often showed that advisory committees were not holding meetings and were incurring costs, yet GSA did not question the need to continue them.

For example, 86 advisory committees were reported as having no meetings for up to 2 years (fiscal years 1986 and 1987). The 86 committees incurred costs totaling $535,000 during fiscal year 1987, about 78 percent of which was for federal staff compensation. The agency reports discussed the reason 60 committees had not met, citing such things as 20 committees were newly established, 16 committees had no agenda items to consider, and other committees experienced delays in appointing members, had no chairpersons, or lacked funding. Agencies responsible for the remaining 26 advisory committees did not report any reasons why the committees were inactive.

GSA did not obtain additional information on why the committees did not meet and did not question the need for them.

Similarly, in its consultation role, GSA concurred in establishing advisory committees without having obtained complete charters and justifications for the committees. The agencies' submissions to GSA were often missing information that FACA or GSA regulations require to be provided and that GSA said it needs to determine FACA compliance. Of the 114 proposed charters sent to GSA from October 1986 to May 1988, 42 did not contain certain items of information required, such as estimated annual operating costs. GSA concurred in establishing all 114 advisory committees.

GSA has prepared the President's annual reports to Congress required by FACA. While the reports have contained the information specified in FACA, they were not submitted to the President in time for them to be forwarded to Congress by December 31 as required. Also, the reports submitted in recent years have included less analysis than some earlier reports. For example, the reports for 1982-1984 presented extensive analytical data on advisory committees' costs; the 1985 report included less cost analysis; and the 1986 and 1987 reports did not contain any of this kind of data that could be useful in identifying trends and possible areas in need of management attention.

The follow-up reports required by FACA on the status of recommendations made by Presidential advisory committees have not been sent to Congress since the early 1980s. GSA is responsible for preparing the reports.

According to GSA, it had not fully implemented its FACA responsibilities for a variety of reasons, including a lack of staff capability, inadequate information, and organizational and management changes.

You asked for our views on how the Committee can assure the Secretariat functions are effectively carried out. Specifically, you questioned whether GSA may need additional staff resources for this purpose and whether the Secretariat should possibly be in an agency other than GSA.

Because GSA had not implemented many of its FACA functions and had not developed a plan for doing so, it is difficult to say whether it has adequate resources. We did note that GSA had increased the size of the Secretariat staff since 1984.

We previously testified before a subcommittee of this Committee that GSA's Committee Management Secretariat was not carrying out many of its responsibilities.[1] At that time, the Secretariat consisted of two and a fraction full-time professional staff members. The number had increased to five professional staff as of September 1988. GSA believes this staffing level is sufficient to handle the FACA requirements.

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[1] Statement of Rosslyn S. Kleeman, Associate Director, General Government Division, before the Subcommittee on Information Management, Committee on Governmental Affairs, United States Senate, June 21, 1984.

We do not believe that organizational changes, such as moving the Secretariat functions to another agency, would necessarily correct the problems we found. There is a need, however, for more attention by top-level GSA management on developing plans and appropriately directing its resources to accomplish the required FACA functions. In other words, if GSA believes it now has the staff resources it needs to do all FACA functions, its objective must be to see that the functions, in fact, are accomplished.

COMMENTS ON S. 2721

Our reviews of FACA's administration and implementation generally support the amendments proposed in S. 2721. Our comments are limited to those provisions of S. 2721 that affect matters addressed in our prior reviews.

GSA's Responsibilities

S. 2721 would require that, annually, the President submit a summary report to Congress on the activities, status, and changes in the composition of advisory committees and that agency heads submit separate detailed reports to Congress on each advisory committee. The amendment will give GSA more time to analyze advisory committees from a governmentwide perspective. We believe the results of such analyses, provided as part of the President's annual report, would be useful to Congress in carrying out its oversight responsibilities.

S. 2721 would also change the requirement for GSA's comprehensive reviews of each advisory committee from annual to periodic reviews. We agree that GSA should be allowed to use some discretion in scheduling the frequency with which each committee is reviewed.

S. 2721 does not require GSA to report the number and results of the advisory committee reviews it completes. Since GSA had not done the required reviews previously, we believe that the information on the number and results of the reviews should be made a part of the President's annual report to Congress required by FACA.

FACA does not give GSA any recourse when it disagrees with a committee's establishment, management, or termination. S. 2721 would continue to give agency heads final decision authority, but it would also allow GSA to make known to Congress and the public any areas of disagreement by requiring a description of the disagreement in the committee's charter or in the President's annual report to Congress. We believe such disclosure is appropriate and needed.

Subcommittees and Subgroups

S. 2721 would further define "advisory committees" by separately defining subcommittees and subgroups subject to FACA coverage. We understand that an objective is to close a loopehole in FACA, discussed in our June 1984 testimony, wherein subgroups providing advice and recommendations to parent committees, rather than to a federal official, escape FACA coverage. The proposed amendment would not eliminate this loophole, however, because it would still limit FACA coverage to only those subgroups that provide collective advice and recommendations "directly to an agency or federal official."

Most committee subgroups report to a parent committee and not directly to a federal official. To ensure that FACA coverage extends to all committee subgroups that perform substantive committee activity, the definition of subcommittee and subgroups should explicitly include those entities providing collective advice and recommendations to a parent committee as well as to a federal official.

Definition of Meetings

S. 2721 would amend FACA by defining a "meeting" to include any interaction between a majority of advisory committee members at which the substantive business of the committee is discussed. FACA requires that advisory committee meetings must be preceded by public notice, made open to the public unless closed under specific exemptions, and be supported by certified minutes. However, FACA presently lacks a definition of the term "meeting" and therefore agencies and advisory committees can encounter difficulties in complying with these FACA requirements. We believe that the proposed definition will provide agencies and committees with needed guidance as to which interactions among committee members constitute a meeting for FACA purposes.

Also, S. 2721 would provide that advisory committees, (1) to the greatest extent practicable, conduct all business furthering the mandate of the committee through meetings, and (2) may report advice or recommendations to a federal official only after a meeting at which the advice or recommendations are approved by a majority of the members. These revisions to FACA would help assure that advisory committee activities are open to public scrutiny. Presently, FACA requires that all meetings must be open to the public unless closed pursuant to specific exemptions but does not provide that advisory committee business should be conducted through meetings.

Preventing Conflicts of Interest

S. 2721 establishes new requirements aimed at preventing conflicts of interest on the part of advisory committee members. Prospective members would be required to file financial disclosure statements before they are appointed or begin committee service. The statements would be reviewed for apparent or potential conflicts, and any conflicts discovered would have to be resolved.

We believe the requirement for early screening and resolution of conflicts of interests is needed. Resolving conflicts before advisory committees begin business is important to ensuring that committees operate as independently as possible and that committee members serving as government employees are protected from the risk of taking actions which could constitute criminal offenses under the federal conflict of interest laws.

Although we support the thrust of this provision, we are concerned that the requirement as proposed extends to all prospective advisory committee members, whether or not they are designated as government employees. Generally, individuals who are expected to serve the government in an independent capacity are appointed as regular or special government employees; and by virtue of such appointment, they are subject to conflict of interest laws. In contrast, individuals who are invited to represent private sector interests before the government are generally not considered government employees subject to these laws.

We question the need to require the routine collection of financial information from prospective members who will not serve as government employees since they are not subject to the conflict of interest laws. Such an inflexible requirement could have the effect of deterring some individuals from providing service to the government. If the requirement is to apply to all persons serving on advisory committees, we recommend the addition of a provision permitting agency heads to waive the requirement, as they deem appropriate, for non-government employees.

Another S. 2721 provision would require advisory committee management officers to oversee and provide counseling on ethics issues and financial disclosure obligations. While we believe that committee management officers would function more appropriately as liaisons between committee members and agency ethics counselors, rather than ethics counselors themselves, we support the oversight and monitoring envisioned in this proposed amendment.

Balanced Membership

Several provisions in S. 2721 address balanced membership on advisory committees. The existing provisions of FACA require that advisory committee membership must ". . . be fairly balanced in terms of points of view represented and the functions to be performed . . ." but neither the act nor GSA regulations specify how the balanced membership requirement is to be met.

We believe that the proposed amendment to the findings and purposes section adding a precatory statement of factors to be considered in selecting committee membership provides useful guidance for achieving balance. At the same time, S. 2721 states the operative requirement for achieving balance: Congress, the President, and agencies must prescribe in advance of committees' establishment the specific factors to be considered in achieving balanced committee membership. These provisions would give authorities establishing committees flexibility to structure committee membership to fit the functions of the particular committee involved, while also providing accountability for the factors used in selecting advisory committee members.

That concludes my prepared statement. I will be pleased to answer any questions you may have.

GAO Agencies With 25 or More Committees in FY 1987

Agency	Number
Health and Human Services	268
Interior	157
National Science Foundation	72
Commerce	68
Defense	59
Commission on Civil Rights	51
Agriculture	48
Veterans Administration	34
Transportation	26

GAO Missing Items in 114 Charters Sent to GSA in 1987–1988

Missing Item	# of Times Missing
Agency responsible for supporting committee	30
Annual operating costs	7
Number and frequency of meetings	3
Agency or official to whom the committee reports	1
Committee's duties	1
Total	42

GAO Missing Items in 114 Justifications Sent to GSA in 1987–1988

Missing Item	# of Times Missing
Agency's plan for attaining balanced membership	15
Why the functions could not be performed elsewhere	9
Why the committee is essential to agency business and in the public interest	5
Total	29

GAO Agencies' Explanations to GSA for Committees With No Meetings

Explanation	1 Year	2 Years
New committee during fiscal 1987	28	—
No explanation given	8	18
No agenda items during year(s)	12	4
Delay in appointing members	—	5
Reorganization/program guidelines revised	3	1
No funding	1	2
Chair resigned	—	2
Scheduling difficulties	2	—
	54	32

GAO Agencies With 2 or More Committees Holding No Meetings in FY 1987

Agency	Number	Cost
Health and Human Services	25	$374,724
Interior	25	75,530
Defense	5	11,468
National Science Foundation	5	0
Agriculture	4	9,187
Labor	4	5,454
General Services Administration	2	6,000
Transportation	2	0
Commerce	2	0

GAO RESPONSES TO QUESTIONS ON THE GENERAL SERVICES ADMINISTRATION'S IMPLEMENTATION OF THE FEDERAL ADVISORY COMMITTEE ACT

1. Did GSA provide any justification for approving charters for advisory committees in the absence of appropriate supporting documentation, such as the absence of data on annual operating costs?

GAO Response

GSA did not provide any specific justification for concurring with agencies' recommendations to establish or re-charter advisory committees. Our review showed that GSA had not obtained the information necessary for thorough reviews of agencies' chartering requests and that it did not have adequate justification for concurring with the requests.

It should be noted that, in reviewing chartering proposals, GSA views its role as advisory in nature. The act gives agency heads the authority to create advisory committees. Under S. 2721, agency heads would continue to have this authority, and we believe they should. If adopted, however, the amendments would strengthen GSA's role in the chartering process by requiring it to make known to Congress and the public any areas of disagreement between GSA and the agencies. We support this amendment because the disclosure requirement, coupled with thorough reviews of chartering proposals by GSA, can help ensure that advisory committees are justified before they are created or renewed.

2. Did GSA offer an explanation for the diminished use of cost analysis in its annual reports to the President and Congress?

GAO Response

GSA said that the time constraints in meeting the statutory deadline have accounted for the diminished use of cost analysis in its annual reports to the President and Congress. The law requires that the reports be submitted to Congress by December 31 each year. GSA reduced the delays in meeting that target from 10 months for the 1985 report, to 6 months for the 1986 report, and 2 months for the 1987 report. At the same time, it reduced the extent of analysis done in support of the reports.

3. Has GSA offered any explanations as to why follow-up recommendations to the President and Congress have not been forwarded to Congress since the early 1980s?

GAO Response

GSA officials said that they did not have the expertise to determine the adequacy of an agency's proposal for action or reasons for inaction on recommendations made by Presidential advisory committees. Also, GSA had not pinpointed responsibility for preparing the reports. Its regulations, issued December 2, 1987, read in this regard that:

> "Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate will prepare a follow-up report to the Congress detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act;" (Underscoring supplied.)

GSA issued the regulations while acknowledging that some confusion existed as to whether GSA or the agency responsible for supporting the Presidential committee should transmit the report. GSA said that it plans to propose further guidance in a future revision to the regulations.

4. You mentioned that GAO endorses the provision of S. 2721, which would require agency heads to submit separate detailed reports to Congress on each advisory committee. However, don't you feel that such an arrangement would further fragment responsibilities for the oversight of Presidential advisory committees? Wouldn't this also constitute duplication of responsibilities as the President would still be required to submit annual reports to Congress on the status of Presidential advisory committees? Do you have any cost estimates associated with this provision?

GAO Response

We do not believe that the S. 2721 reporting requirements would result in fragmentation or duplication of responsibilities because each report would serve a different purpose. The reports required of agency heads would provide detailed information on the activities of advisory committees, and the agencies themselves are in a better position than GSA to provide this information. The report required of the President and prepared by GSA would be a summary report. GSA is in a better position than the agencies to assemble this report and in so doing to provide thorough and independent evaluations of advisory committee activities from a government-wide perspective. Shifting the responsibility for developing the detailed, individual agency reports to the agencies will give GSA more time to make these evaluations and prepare meaningful summaries.

We have no cost estimates associated with the reporting provision.

Agencies' Explanations to GSA for Committees With No Meetings

Explanation	1 Year	2 Years
New committee during fiscal year 1987	28	-
No explanation given	8	18
No agenda items during year(s)	12	4
Delay in appointing members	-	5
Reorganization / program guidelines revised	3	1
No funding	1	2
Chair resigned	-	2
Scheduling difficulties	2	-
	54	32

Missing Items in 114 Charters Sent to GSA in 1987 - 1988

Missing Item	# of Times Missing
Agency responsible for supporting committee	30
Annual operating costs	7
Number and frequency of meetings	3
Agency or official to whom the committee reports	1
Committee's duties	1
Total	42

Missing Items in 114 Justifications
Sent to GSA in 1987 - 1988

Missing Item	# of Times Missing
Agency's plan for attaining balanced membership	15
Why the functions could not be performed elsewhere	9
Why the committee is essential to agency business and in the public interest	5
Total	29

Agencies With 2 or More Committees
Holding No Meetings in FY 1987

Agency	Number	Cost
Health and Human Services	25	$374,725
Interior	25	75,530
Defense	5	11,468
National Science Foundation	5	0
Agriculture	4	9,187
Labor	4	5,454
General Services Administration	2	6,000
Transportation	2	0
Commerce	2	0

Agencies With 25 or More Committees in FY 1987

Agency	Number
Health and Human Services	268
Interior	157
National Science Foundation	72
Commerce	68
Defense	59
Commission on Civil Rights	51
Agriculture	48
Veterans Administration	34
Transportation	26

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT of JAY PLAGER
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
before the
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
Hearings on the Federal Advisory Committee Act
October 5, 1988

Mr. Chairman, thank you for the opportunity to testify today on S. 2721, "The Federal Advisory Committee Act Amendments of 1988," and on related committee management matters. Advisory committees provide a unique and cost-effective way for the government to get good advice from knowledgeable public experts. Often unobtainable in other ways, this essential advice improves public policy decision making.

From a review of the legislative history of the Federal Advisory Committee Act, it is clear that it has a number of different objectives. While it recognized the utility of such committees it also sought to bring them under effective administrative control. It sought to ensure their efficient operation while limiting their number. It sought to ensure that the President and the agencies were afforded advice they needed from such committees while insulating their operation from undue influence. While it sought to bring under its scope, and thus open to broad public participation, many informal advisory arrangements, it also attempted to limit the administrative burden that complying with the Act would entail, in order to ensure maximum participation. Not all of these objectives are entirely compatible.

Furthermore, as OMB Deputy Director Joseph Wright observed in 1984, in testimony before the Subcommittee on Information Management and Regulatory Affairs, determining the scope of the Act remains very difficult. Officials of the executive branch continually meet with, talk with, get advice from and answer questions for individuals, agencies, organizations, and businesses. Defining which of these interactions is subject to the procedures of the Act is a difficult task. Moreover, some of the Act's provisions are written in a fashion that permit lawyers to argue over their meaning. The effect of some of these arguments, and some of the court decisions that have resulted, is to make it harder for agency officials to obtain advice promptly or even to meet with members of the public. Reform is needed, and S. 2721 is a first step in that direction. In some cases, however, S. 2721 goes in the wrong direction.

Committee Management

On the whole, the Act and the GSA Committee Management Secretariat have have contributed positively to Government decision-making. Committee management has received high level attention in this Administration. Early in his second term, President Reagan issued a memorandum entitled "Reform of Federal Advisory Committees." This effort resulted in a number of recommendations for the improvement of committee management. In April 1987, the President's Council on Management Improvement (PCMI) conducted a follow-up study to see how well those recommendations had been implemented, and, in March 1988, produced additional recommendations for follow-up work. I think the record shows that we have made a great deal of progress in assuring that the committees are set up and operated on a cost-effective basis, and we have set in motion additional efforts to ensure that this progress is continued in the future. It is encouraging to see that the bill's authors have seen fit to incorporate some of the PCMI recommendations into S. 2721.

GSA also issued a regulation in December 1987 that streamlined certain procedures, and resolved one very important issue, that is, the compensation of committee members.

OMB is an active working member of the Interagency Committee on Federal Advisory Committee Management. In addition to closely participating in the development and review of legislative proposals, we keep abreast of the Interagency Committee's progress and recommendations. As you know, we review the resource levels for GSA's Secretariat functions including the operation of the Interagency Committee: funding for the Secretariat increased from $193,000 in 1986 to $223,000 in 1987 to assist in carrying out increased management activities.

The Secretariat is fulfilling the role that GSA was delegated under Executive Order 12024. S. 2721 would codify this role. We believe the current relationship represents the proper role for the OMB, and would strongly discourage any return of this operational role to OMB.

Finally, you asked specifically in your letter about OMB's role in preventing and terminating unnecessary advisory committees, including statutory ones. As for the creation of committees by agencies, OMB uses the budget process as a means of reviewing whether or not an agency has a need for a particular committee or whether the functions that the committee would perform could not be added to the work of an existing committee. Agencies routinely consult with OMB before creating or extending the life of advisory committees. Statutory committees, of course, are less responsive to this method of supervision, but this is one area that we see constructive activity within S.2721.

S. 2721

I would like to turn now to the bill. As we indicated in our testimony in 1984, we would not oppose a narrow revision of certain parts of the Advisory Committee Act. Parts of S. 2721 address concerns we raised in 1984, or make other useful administrative or procedural changes. The bill does treat in some fashion other concerns that we raised in 1984, although not always in a manner to our liking. This hearing will be useful to develop the record further on these matters.

Our criteria for analyzing the bill are four-fold: first, that any revisions to the Act support the economic and efficient use of advisory committees; second, that the revisions serve to clarify areas which have been the subject of frequent and expensive litigation; third, that the revisions do not establish needless impediments to fruitful discussions between Federal officials and members of the private sector; and fourth, that statutory changes are required, that is, administrative action would not suffice.

One useful thing the bill does is to define "meeting." The proposed definition would limit coverage to substantive, decision-making meetings of a majority of the members. Together with the definition of "subcommittee or subgroup," coverage is appropriately limited to those subcommittee meetings where advice is being provided directly to an agency. The bill is going in the right direction here.

Another useful provision is the provision to allow the President or an agency head to terminate a statutorily-created committee after giving Congress adequate notice. We believe this will improve committee management and serve economy and efficiency.

Concerns about S. 2721

We have four principal concerns about S. 2721, in large part because key provisions would make it more difficult for Federal officials to use advisory committees. The provisions on balanced membership are quite troublesome in this respect. Certainly there has been some feeling that the balanced membership provision in the current Act is defective and that more definitive guidance is needed. When committees are established to gain very specific technical advice and information, it is not clear what a requirement for fairly balanced representation means. We believe that this lack of clarity is probably best resolved administratively, but are not necessarily opposed to carefully drawn statutory language. How does S. 2721 treat this area?

In the "Policy" section, the bill applies the Act's requirement for Congressionally created committees to all committees, namely, that they be "balanced in terms of the points of view represented and the functions to be performed." It goes on to add "with emphasis given to obtaining representation of interests which will be directly affected by the committee's work and to obtaining expertise relevant to the committee's work." In a later section on the establishment of advisory committees, the bill would require that the establishing determination contain provisions to ensure the balanced representation policy is met, and "prescribe the factors to be considered in achieving balanced membership."

Finally, the bill would require that the committee charter contain a "plan for achieving a balance in committee membership."

What would be the net effect of these provisions? The policy section specifies two criteria. "Interests which will be directly affected by the committee's work," and "expertise relevant to the committee's work." The second of these is intuitively reasonable. The first, however, would take us down a very slippery slope. The sole qualifier, "directly," is vague enough to be read to give standing to virtually anyone to argue that they would be affected. And history teaches that argue they would.

As the legislative history tells us, the balanced membership guidance contained in the Act, and the requirement that the committee's recommendations "will not be inappropriately influenced by . . . any special interest," are "particularly important among the guidelines" in the Act. But the approach this bill has taken seems to create more difficulties than it remedies. We fear that the net effect of these additional provisions would be to stimulate litigation about compliance with these provisions without actually strengthening the policy of balanced membership.

A second area of concern is that the bill is inconsistent with regard to the participation of private experts in its treatment of conflict-of-interest. On the one hand it attempts to ensure that real experts directly affected by a committee's recommendations be included in the membership. On the other hand it would discourage participation by such persons by suggesting that their real stakes in the committee's work would constitute a conflict-of interest. In addition, it does not provide adequate confidentiality for financial disclosure reports filed by new or existing committee members. Federal employees and special government employees are already covered under Federal conflict-of-interest statutes and standards of conduct regulations, and this coverage is adequate. We believe that adding references in the GSA regulation to these provisions would be a useful additional step, and do not see a need for additional statutory coverage in this area.

Our third area of concern is that the bill as drafted treats Presidential and agency advisory committees identically. We are concerned that the provisions discussed above would impinge on the prerogatives of the President by unduly burdening the President's appointments power.

A fourth area of concern is the requirement to publish disagreements between agency heads or the President and the Administrator of GSA, which raises serious legal issues and could chill interagency deliberations and seriously reduce the value of the advisory committees at issue.

There are numerous other technical points that bear discussion. GSA has raised some of them in its testimony, and others, such as the large increases in agency reporting and recordkeeping the bill would create, should be considered further before the Congress proceeds.

Mr. Chairman, OMB will continue to take a great interest in the proper functioning of advisory committees, and in ensuring that the statutory and regulatory underpinning for committees provides for their proper functioning. Careful balancing is required in order to encourage openness without undermining the usefulness of committees. We should avoid raising unnecessarily the costs, financial and administrative, of using these committees to provide expert advice to Federal officials. Thank you.

Statement of Paul T. Weiss
Associate Administrator for Administration
U.S. General Services Administration
Before The Committee on Governmental Affairs
Of the Senate of the United States
On the Federal Advisory Committee Act

October 5, 1988

FOR RELEASE ON DELIVERY
Expected At 10:00 A.M.
Wednesday, October 5, 1988

STATEMENT OF PAUL T. WEISS ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION U.S. GENERAL SERVICES ADMINISTRATION BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS OF THE SENATE OF THE UNITED STATES ON THE FEDERAL ADVISORY COMMITTEE ACT

Mr. Chairman, thank you for the opportunity to testify today on S.2721, the "Federal Advisory Committee Act (FACA) Amendments of 1988." We also welcome the occasion to comment on a recent review conducted by the General Accounting Office (GAO) of the steps taken by the General Services Administration's (GSA's) Committee Management Secretariat to improve the Act's implementation within the Executive Branch.

Accompanying me today is Mr. James L. Dean, who is responsible for directing the Secretariat's activities. The Secretariat is mandated by section 7(a) of FACA.

Discussion of S. 2721

Mr. Chairman, in testimony presented to the Committee on December 3, 1987, GSA outlined several areas concerning FACA which could benefit from legislative action. They were:

- First, the definition of an "advisory committee" as it relates to FACA. We are concerned that the overly broad meaning contained in the current statute may actually impede compliance with congressional intent.

- Second, the circumstances under which FACA's open meeting provisions apply. GSA suggested that agencies be given additional latitude to discuss "housekeeping" business.

- Third, the ability of Executive Branch Departments and agencies to terminate statutorily directed advisory committees through administrative action. We believe agencies should have the ability, with congressional concurrence, to terminate inactive committees in this category.

- Fourth, the requirement contained in section 7(b) of FACA which directs an Annual Comprehensive Review (ACR) of all Federal advisory committees. GSA suggested changes to allow cyclical, rather than annual, reviews based upon a given committee's mission, longevity, and other pertinent factors.

- Fifth, clarification of the requirement for "balanced membership" contained in section 5 of the Act.

- Sixth, the deadline for the submission of the Annual Report of the President on Federal Advisory Committees. GSA suggested the current deadline (December 31), contained in section 6(c) of FACA be revised to provide greater consistency with the congressional schedule.

- And last, the relevance of section 7(e) of FACA, on providing budget recommendations relating to the operations of Federal advisory committees. GSA noted that such budget data is normally contained within Departmental requests, but is not routinely portrayed as separate line-items. Since FACA does not provide GSA with specific authority within the budget process, we suggested deleting section 7(e).

Mr. Chairman, S. 2721 addresses many of the issues we raised during the Committee's initial FACA hearing. In particular, we believe the Bill effectively embraces our suggestions addressing advisory committees created by statute, but which have outlived their purposes; defines a more logical basis for reviewing committee accomplishments on a periodic basis; and, provides for the submission of the Annual Report of the President consistent with the congressional schedule and production requirements.

We believe, however, that the proposed legislation is internally inconsistent with regard to several important matters. For example, sections 5(b)(4) and 6(b)(4) require establishing authorities to indicate whether or not members of an advisory committee are to be appointed as Federal employees or, instead, will be expected to represent the views of non-Federal organizations or interests. This language would seem to indicate that no additional changes in procedures relating to Federal conflict-of-interest statutes are contemplated by the Act. However, section 10(c)(5) requires the prospective members of a committee file disclosure information with the appointing authority prior to assuming any committee functions.

Overall, we believe this section merits reconsideration for a number of reasons. Requiring the prospective filing of financial information is inconsistent with current filing requirements imposed generally on government employees. More specifically, this requirement is even inconsistent with treatment given Senate-confirmed, but part-time, employees.

Moreover, GSA does not believe it would be in the best interest of the Government to require mandatory disclosure for all advisory committee members under all circumstances. For example, current ethics guidelines recognize exemptions for individuals acting in representational capacities. These individuals should continue to be exempted from disclosure insofar as their interests and biases serve as the basis for their participation.

Similarly, FACA's provisions relating to the use of pre-existing groups in the interest of efficiency and relevancy should be protected. Application of disclosure requirements to these so-called "utilized" groups would have a chilling effect upon Federal access to their resources.

A broader chilling effect upon individual participation in committee activities must also be avoided through an explicit provision ensuring that disclosure forms are subject to confidentiality. We believe this protection of individual interests is consistent with congressional intent in this area and existing precedents.

In a related matter, section 10(e)(5) of S. 2721 provides that departmental Committee Management Officers (CMOs) shall "oversee and provide counseling on ethics issues and financial disclosure obligations." This provision duplicates existing responsibilities assigned to departmental ethics counselors. In addition, CMOs are not (in general) well prepared to perform these tasks by virtue of their training and background. We do, however, believe CMOs can continue to effectively address the overall management control requirements related to ethics concerns, as currently specified by FACA and section 10(e)(1) of the proposed Bill.

GSA believes the proper role of the CMO is to assure that the many requirements affecting the operation of FACA are tied together through appropriate internal management instructions, and other efforts to assure familiarity with the Act. We do not believe it is necessary for CMOs to maintain operational control over individual committees or, as suggested by section 10(e)(4), to actually supervise the Designated Federal Officials (DFOs) assigned to each advisory group. Such explicit line relationships may result in an over-centralization of management accountability for committee operations, thereby impairing the achievement of a group's goals and objectives. We would, therefore, recommend deleting section 10(e)(4).

The proposed Bill also presents certain other operational concerns, such as:

Responsibility for ongoing review of committee activities.--Section 5(b) of S. 2721 provides for "a committee of the Senate and of the House of Representatives..." to review proposed statutory committees. It is unclear if this responsibility is to be lodged with the standing committees, or whether ad hoc groups are to be created by Congress for this purpose.

Records management provisions. Section 12(c) poses two concerns. First, it provides that advisory committee records shall be available for inspection at a single location during the life of the group, and for a year thereafter. Since many committees, and in particular those created by statute, have relatively long life-spans, agencies are often faced with substantial records management problems. To alleviate those problems, GSA suggests that the proposed Bill be revised to apply existing records management guidelines developed by the National Archives and Records Administration wherever possible.

Secondly, section 12(c) assigns an operational records management role to the Secretariat which is inconsistent with its governmentwide oversight role. The function of caring for records generated by presidential advisory committees would unnecessarily burden the Secretariat's staff resources.

Advisory committee support. Sections 10 and 14 each raise concerns with regard to the responsibility for the operations of advisory committees under certain circumstances.

Section 10(c)(3)(c) provides that an agency head shall file a charter for a committee if an employee of that agency serves as the group's Designated Federal Official (DFO). GSA does not believe this criterion is essential to making a determination of accountability for a committee's existence. Under some circumstances, for example, an employee may be detailed to serve as the DFO to a committee operated by another agency. Since FACA and the proposed Bill both provide that support may be assumed by only one agency at a time, the proposed section would generate confusion. GSA suggests that section 10(c)(3)(c) be deleted for these reasons.

Section 14 (b) provides for support by GSA to presidential advisory committees, unless otherwise provided by the group's charter. This section should be clarified to provide that such support by GSA, where it is requested, is to be on a reimbursable basis as currently provided by FACA.

Reporting requirements. Section 15 of the proposed Bill stipulates that at least 8 copies of each committee report and background papers prepared by consultants be filed with the Library of Congress. GSA believes this requirement is excessive and should be reduced to 1 copy in the interest of efficiency and economy.

Mr. Chairman, this concludes our remarks on S. 2721. We believe that the Bill contains significant improvements although, as we have indicated, there are provisions which raise significant concerns and need further attention. We are looking forward to working with the Committee to address these issues.

The Role of the General Services Administration's Committee Management Secretariat

Mr. Chairman, you asked that we address what we believe the proper role of the Committee Management Secretariat is, or should be, within the context of its governmentwide oversight responsibilities assigned by FACA.

In the simplest of terms, the Secretariat should direct the majority of its resources toward assuring Federal advisory committees fulfill their missions effectively and comply with the provisions of FACA. We believe the Act provides an appropriate management structure for accomplishing these objectives and permits GSA to draw upon the resources of Departments and agencies, through Committee Management Officers, to further FACA's intent.

During the past 18 months, GSA took major steps to refine the processes and procedures used by the Secretariat to accomplish its mission, as well as to redeploy resources toward those functions assigned by the Act which are of the utmost importance. A new strategic direction for the unit has been set, as portrayed in Attachment 1, and the investments flowing from this approach have resulted in the initiation of many improvements. Attachments 2 and 3 summarize the results of these efforts during fiscal years 1987 and 1988.

Equipped with an enhanced information processing capability, strengthened staff, improved institutionalized relationships between GSA and the Federal community, and revised regulatory guidelines, the Secretariat will be better able to:

- Fully implement FACA's provisions regarding the conduct of an Annual Comprehensive Review of each advisory committee. This effort will be aided by an extensive database covering each group during the course of its existence. Problems will be more accurately pinpointed and resolved.
- Provide assistance to the Federal community in better understanding FACA's requirements. GSA is currently in the process of developing a training course on the Act which will be made available on a governmentwide basis. This course will be available during the Spring of 1989 and is tailored for the wide range of officials who are responsible for implementing the Act's provisions. A brochure is also under development which summarizes the Act. This will be particularly helpful during the upcoming presidential transition for use in providing new Executives with appropriate information and guidance. This course will also be made available to departments and agencies for the purpose of briefing advisory committee members on FACA and their roles.
- Assure that reporting requirements relating to presidential commissions are fulfilled. GSA's new proposed rule on FACA will establish new procedures to accomplish this purpose.
- Identify potential instances of duplication between advisory committees. The Secretariat's new computer system, mentioned above, will greatly improve the process of consultation with agencies through automated matching of proposed committees with existing groups.

Other improvements, such as standardization of committee reporting forms and consultation requests and the development of checklists, to be pursued during fiscal year 1989 will have an appreciable effect upon the effectiveness of the Secretariat. Taken together with the achievements of the past 18 months, these efforts will place the unit in a much stronger management position.

Recommendations by the General Accounting Office

Mr. Chairman, we have had the opportunity to review the draft final recommendations of the General Accounting Office (GAO) resulting from its recent study of the Secretariat's operations. Among the issues raised during our close-out discussions with GAO were the following:

Adequacy of GSA's efforts to implement the Annual Comprehensive Review (ACR) required by FACA. GSA recognizes that the ACR must be addressed in a more pro-active fashion. GSA has not used the data collected as part of the ACR as advantageously as possible, and problems remain with regard to the overall quality of information gathered as part of that effort.

Beginning with the fiscal year 1988 review cycle, GSA will dedicate approximately 2 staff years to the ACR process. With enhanced computer support, this will result in better and more consistent information for use by GSA, the President and Congress.

Charter documentation. GAO discussed several instances where they believed Federal departments and agencies had not provided all chartering information required by FACA. We believe that there should be no ambiguities within the charter documentation submitted to GSA and Congress. However, the omissions appeared to be relatively minor in some cases and, in others, the missing information was contained in the agency's transmittal letter, or other associated documentation. As mentioned above, the development of a standard chartering form will effectively address these concerns.

Presidential advisory committee follow-up reports. GSA believes that section 6(b) of FACA should be more consistently implemented. While the work of many presidential panels results in follow-up reports generated by GAO (for example, the Commission on the Space Shuttle Challenger Disaster), or other reports to Congress, some are not prepared.

This situation has arisen, in part, due to ambiguities in GSA's regulatory guidance and unfamiliarity with the requirement on the part of agency personnel. Both shortcomings are being addressed by GSA: The first through enhancements to GSA's rule on FACA, and the latter through broadened training efforts. In the future, all required reports will be tracked on GSA's automated Committee Management Information System.

Effectiveness of the consultation process. GSA believes the consultation process mandated by FACA is essential to the effectiveness of analyses performed to identify possible instances of duplication, as well as serving as an opportunity to facilitate interagency efforts, where appropriate. The consultation process will become increasingly important as GSA seeks to tie proposals for establishment, reestablishment, or renewal to the Annual Comprehensive Review and its automated inventory.

Mr. Chairman, this concludes my remarks. I will be happy to answer any questions the Committee may have.

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Attachment 1
Committee Management Secretariat
Strategic Plan

**Full
Implementation of FACA**

**Institutionalize
Management Improvements**

**Strengthen
Executive Branch Staff Capacity**

**Modernize
Computer Support**

**Upgrade
Secretariat Staff**

Attachment 2

General Services Administration (GSA)
Committee Management Secretariat
Fiscal Year 1987 Management Initiatives/Accomplishments

PRIMARY MANAGEMENT INITIATIVES

	Regulations	Computer Support	Personnel	Annual Report	Legislation
JUNE		Needs Assessment Complete			1st Contact With Cmte. On Govt. Affairs PCMI Report Initiated
JULY					
AUGUST	Proposed Rule Pub.	System Specs. Completed	Consultant Engaged		
SEPTEMBER		Computers Ordered	New Prof. Staff Hired		

Attachment 3

General Services Administration (GSA)
Committee Management Secretariat
Fiscal Year 1988 Management Initiatives/Accomplishments

PRIMARY MANAGEMENT INITIATIVES

	Regulations	Computer Support	Personnel	Annual Report	Legislation
OCTOBER	******************GSA Interagency Committee On FACA Created****************				
DECEMBER	Final Rule Published				Testimony Before Govt. Affairs Cmte.
MARCH		System Received	Temporary Staff Hired	16th AR Completed	PCMI Report Completed
APRIL	New Prop. Rule Review With OMB/ Govt. Affairs				DOD Hearing Before Govt. Affairs Cmte.
MAY		FY 1987 Data Loaded Into Database	Started Over 600 Hours of Staff Training		GAO Study Initiated
JULY				AR Format Redesigned	
AUGUST	Prop. Rule Approved by GSA, Sent to OMB				1st DOD Rpt.
SEPTEMBER				FY 1988 Instructions Issued	
OCTOBER				Data Due	Hearing

UNIVERSITY OF SOUTHERN CALIFORNIA
UNIVERSITY PARK
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STATEMENT OF MICHAEL R. LONGO, III, COUNSEL FOR THE UNIVERSITY OF SOUTHERN CALIFORNIA BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS OF THE SENATE OF THE UNITED STATES REGARDING THE PROPOSED AMENDMENTS TO THE FEDERAL ADVISORY COMMITTEE ACT.

October 5, 1988

Mr. Chairman and Honorable Members of the Committee:

I. INTRODUCTION

I appreciate the opportunity to appear before this committee on behalf of James H. Zumberge, President of the University of Southern California, to discuss the most recent amendments which have been proposed to the Federal Advisory Committee Act (FACA). I believe it will be useful to the members to have some input from the ultimate "user", the consumers if you will, of the provisions of the Act--how they and the related conflict-of-interest provisions of Federal Law and the applicable Executive orders, impact on members of the university research community.

This statement will focus on our experiences under the existing legislation, and on the anticipated effects of the proposed revisions to FACA. Our perspective is that of an employer attempting to ensure that its employees comply with FACA's requirement.

We will also address the problems which FACA poses for members of the academic and research community when they endeavor to serve the Federal government in an advisory capacity, and will examine whether the proposed revisions will help solve those problems.

Finally, we will offer some suggestions which we believe will be useful in helping to ensure compliance with FACA and the various conflict-of-interest laws.

II. BACKGROUND OF USC'S INVOLVEMENT

The University of Southern California is one of the premier private research and teaching universities in the nation today. It is nationally recognized as an AAU University as one of the top twenty-five out of the more than three-thousand colleges and universities nationwide in terms of the volume of its research. It is also noted for its dynamic faculty and its outstanding research facilities. The University operates over 27 Departments and Divisions on two separate campuses. The range and breadth of our research is, therefore, quite extensive.

As with any major university, USC employs numerous professors, research faculty members, administrators and other professionals who are well-respected as experts in their fields. As a result of their expertise, these employees are often asked to advise the Federal Government both in their individual capacity and as representatives of the University.

As the members of this committee are already aware, one of our leading research units, the Information Sciences Institute (ISI), became entangled in the problem of the applicability of FACA and the various conflict of interest provisions of the Federal law. Specifically, the problem concerned the service of one of our Senior Researchers, Dr. Danny Cohen, on an SDI established panel known as the "Eastport Group."

(As an aside, Mr. Chairman, I must say that I was pleased by the overall findings of the Office of Government Ethics in its response to your call for a thorough investigation of the Eastport matter.)

When I attended the April 19, 1988, hearing of this Committee regarding Eastport and ISI, the testimony raised concern on my part, not only about ISI but also about other researchers at my institution and at others across the Nation. Several questions came immediately to mind. These included:

1) Have other researchers at various universities received advice similar to that received by Dr. Cohen from the founders of Eastport?

2) How many other potential "Eastports" are there in the USC academic community, as well as at other research universities?

With the full support of the senior academic and administrative leadership of the University of Southern California, it was decided that we would meet this serious issue head on, fulfilling our mission as a university to investigate and to educate.

First, we decided to find out how many of our researchers are involved in providing advice to various government agencies and to determine which Government organizations are establishing such advisory committees.

Second, and from our perspective far more importantly, we committed to educate our faculty concerning the existence of FACA and the other various conflict of interest rules and regulations. We drafted a letter to them to this effect that also included suggested questions they should ask of government officials who seek their services on various advisory panels.

Our FACA audit began with the current academic semester which started in early September. It is, therefore, at too early a stage for us to have useful statistical information to share with the Committee. We will however, be happy to provide you with that information, once all of our data is available.

In the preparation and circulation of a draft of our "Notice" letter, and in our early conversations with faculty, we have discovered a number of interesting points which are appropriate to share with the Committee. The following is based on our preliminary information and discussions.

First, as we had expected, each of the many Federal agencies involved in the establishment of advisory committees in one form or another have a different interpretation of FACA's applicability. Some Federal agencies did not believe FACA applied to their situation because advisors were being obtained under an established Federal contract. In other cases, we discovered that advisory committees were being designated as "summer studies," "research groups," "working groups," or other such nomenclature designed to give the impression at least that the operations of these committees were not governed by the Act.

In addition, we have determined that each federal agency has its own standards of ethical conduct, its own rules and regulations, and its own interpretation of these various rules and regulations. This preliminary information, unfortunately, has lead us to the conclusion that we can not give members of our faculty and researchers clear guidance with respect to FACA compliance and conflict questions without sorting through the rules of each founding Federal agency.

Of greater concern to us, and no doubt, of serious concern to the Committee is the fact that when we asked our researchers and faculty members to ask simple questions of the organizers of advisory committees concerning formation and organization of these committees, researchers were met with a hostile reaction from the organizers. (We have attached a copy of our proposed letter to faculty researchers, as well as our list of suggested questions to ask of committee organizers as Exhibit I to our testimony). In some cases, this reaction caused great concern that our faculty members would be excluded from service on these committees and/or on future advisory panels organized by the respective Federal agencies.

Indeed, we were dismayed to discover that even sophisticated potential committee members are reluctant to raise questions about the formation and operation of an advisory group because of their concern about being excluded from current or future panels. This "fear" of reprisals cannot be understated. It is prevalant throughout the research community. Experts are reluctant to question agency officials because they believe that by asking such probative questions, their opportunities to serve on these various committees will be significantly diminished.

It should also be noted that participation on advisory committees provides a valuable opportunity for university based experts. It may give them notoriety in some instances, and may also serve to enhance their reputation in their field of expertise. Exclusion from such participation may have a significant negative impact on an expert's career. Our initial information indicates that this fear has a basis in fact.

III. DISCUSSION OF FACA AND THE PROPOSED AMENDMENTS

This section will examine the proposed amendments to FACA and discuss the problems which we believe the Committee should also address in amending the Act. We will then offer some suggestions which may prove useful to the members in drafting clear amendments to the Act.

In its present form, FACA poses a number of problems for potential advisors as well as for their employers. The single most important of these from our perspective is FACA's failure to provide adequate notice to individuals asked to serve on such a committee that their activities are governed by Federal law. The Act contains no mechanism by which persons whom are asked to participate in an advisory group can determine whether that group meets the requirements of FACA. The average university professor knows little, if anything, about the rules which govern advisory committees. Therefore, he or she is not qualified to investigate whether the advisory group is being properly conducted or what, if any, standards of conduct govern their behavior.

As we noted in our earlier testimony, university based researchers and faculty members are not likely to investigate the formation of the panels upon which they have been asked to serve. Faculty tends to make the assumption that the government agency which has requested his or her services has acted within the parameters of its authority and would not act improperly.

The proposed revision of FACA would not solve this particular dilemma. While the revision does provide that all committee charters must include a statement indicating whether or not committee members serve in the capacity of "special government employees," the revision does not provide for any explicit notice of this status to potential committee members.

Section 7 of the revised Act provides that committee charters need only be filed with the Administrator, the head of the establishing agency, and the appropriate standing committee of Congress. A potential committee member, however, receives no notice as to whether the committee has been chartered pursuant to FACA, nor of their status as a special government employee.

We believe, however, that the revisions are a welcome step in the right direction. The statute as amended does give potential members at least some implicit notice that their activities may be governed by Federal ethics and conflict-of-interest laws. Indeed, Section 10(c) of the revised Act will require that agency heads have prospective committee members disclose in writing and resolve any potential conflict-of-interest before he or she is appointed.

While this resolution process should give potential committee members some notice that their activities are governed by Federal law, we believe that it does not give them any indication of the depth and breadth of the law's coverage. The average layperson in this setting, often times a scientific and technical expert, is unfamiliar with the laws that govern Federal advisory committees and conflicts of interest. These individuals may be highly sophisticated in their own fields of expertise. However, they often lack such sophistication when dealing with complicated legal issues.

A second and related problem with the proposed amendments to the Act is that they do not provide an adequate mechanism by which potential committee members can seek information about the formation of committees.

As this Committee is well aware, FACA imposes a number of substantial, though necessary, constraints on the formation and operation of advisory committees. Indeed, the new iteration of the Act imposes even more stringent requirements. Because of these constraints, in some instances, various Federal agencies have attempted to skirt the existing regulations through a strained construction of the Act and other conflict-of-interest provisions. In other cases, good faith attempts at compliance have been equally unsuccessful due to the difficulty inherent in interpreting the meaning of well-intentioned, albeit poorly constructed legislation. Imposition of greater restrictions may, in some cases, provide greater incentive to Federal agencies to avoid the rules.

Yet the revisions do not provide an adequate mechanism by which potential committee members may seek information about the committee's formation without fear that such questions will cause them to be dismissed from serious consideration for service.

University based researchers and experts tend to give the best advice in the same general area of expertise each time they serve. They tend to work in the same general circle within a relatively small area of the Federal government. As a result of this concentration, an inquisitive faculty member who is branded as a "troublemaker" by a small number of Federal officials may be effectively precluded from serving on advisory committees. Indeed, by demonstrating a heightened level of concern about the proper formation and operation of the advisory committee, and by showing a sensitivity to the very issues which Congress has sought to encourage, researchers may be precluded from such service.

An additional area of great concern to USC, a concern which has been heightened by our Eastport experience, deals with the practice of masking Federal advisory committees by the utilization of independent contractors. This is but one illustration of the way in which FACA and the various other Federal conflict-of-interest regulations fail to establish clear definitions. This lack of clarity results in numerous loopholes in the legislation.

Most interpretations of FACA do not recognize the Act's applicability in situations where advisory committees are established by independent contractors of the Federal government. In order to avoid the restrictions of FACA, Federal agencies may incorporate the advisory committee's function into an existing government contract by simply modifying the statement of work to be performed under the contract. Such a committee may be effectively organized by the establishing agency through the contractor and may make its recommendations either to the contractor or directly to the agency.

In addition to avoiding the restrictions imposed by FACA, this approach also confuses the issue as to whether and which other provisions of the various conflict-of-interest statutes apply to the individuals designated to serve on any such committee.

From an institutional perspective, contractor operated advisory committees make it impossible to effectively monitor the activities of our researchers and faculty members. Additionally, such an approach absolutely precludes counsels from rendering meaningful before-the-fact legal advice to any researcher courageous enough to ask for it.

The currently proposed revisions of FACA do not adequately address this substantial issue.

IV. SUGGESTIONS

The proposed revisions to FACA do not, in our opinion, adequately address these and numerous other issues of great significance. We would, therefore, like to make several suggestions as to how the proposed revision may be modified to better deal with some of these problems.

First, direct notice should be provided to potential committee members before they are appointed to serve on advisory committees. Such notice should explicitly state that they are being asked to serve on a FACA-governed, Federal advisory committee, and that their conduct, as well as that of their employers, may be subject to certain Federal laws and regulations. This notice should consist of a formal "Letter of Request to Serve" which should precede any required financial disclosure forms. The letter should state, at a minimum the following:

1. That the potential committee member is being asked to serve on an advisory committee which is governed by FACA;

2. Whether the potential committee member will be considered a "special government employee" in connection with his or her service on the committee and the general implications of this determination;

3. Which Federal laws, ethics rules, agency regulations, and other standards of conduct the potential committee member and his or her employer will be subject to as a result

of his or her appointment to the committee; and

4. Provide the name, address, and phone number of a designated Federal official who can appropriately answer the potential committee member's questions about FACA and all other laws and regulations which may govern their behavior, or the activities of their employer.

This letter should require the signature of the potential committee member as an acknowledgement of its receipt, and it should be filed with the charter.

A letter such as this will accomplish two things. First, it will provide relatively formal notice to the unsophisticated researcher as to precisely what laws he or she will be subject to as a result of committee appointment. This will better enable individuals who sincerely desire to assist the government to do so without violating any laws.

Second, the letter will give the sophisticated researcher a better indication as to whether the Federal officials organizing the advisory committee are doing so in accordance with the provisions of FACA. It will also serve to remind the advisor as to the standards of conduct he or she must follow.

We also believe that it may be appropriate to establish a mechanism in FACA which enables a potential committee member to directly approach an agency's advisory committee management officer with questions or concerns about the operation of the committee. Such a mechanism would help to ensure that participants do not personally violate any of the laws and regulations relating to their service. It would also serve as an additional means to alert government officials to potential compliance problems which might otherwise go unchecked.

In short, Mr. Chairman, we believe that the proposed amendments should be made more specific and should build in procedural and notice safeguards for the protection of prospective committee members and their employers.

V. ADDITIONAL COMMENTS

Although the scope of this hearing is necessarily limited to the proposed changes in FACA, we believe that it is also appropriate for us to recommend certain changes in the various other federal conflict of interest provisions. Revision of FACA, in and of itself, will not be sufficient to meet the goals which the members of this committee have expressed in their prior testimony. From an institutional perspective, our single greatest concern is the lack of clear and concise definitions. This is a problem from which many of the regulations suffer.

This problem is most clearly evident in the definition of the single most important term in the conflicts legislation, that is, "special government employee." Section 202(a) of Title 18 of the United States Code defines this term as:

> An officer or employee of the executive or legislative branch of the United States government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full time or intermittent basis...

However, Section 202(a) fails to delineate what constitutes an "employee" of the executive or legislative branch. The section does not crossreference any other section of the United States Code wherein the term "employee" is defined. Therefore, an individual is unable to discern what constitutes a "special government employee" by simply reading the statute.

Even after elaborate investigation, it is still difficult for the average individual, or even the average lawyer, to determine the meaning of the term "special government employee." There is little organized and cohesive information on this term, or on the conflict-of-interest laws in general, readily available to the public.

The case law on the subject is also remarkably sparse. Exchange National Bank of Chicago v. Abramson, 205 F. Supp. 87 (Minn. 1969), is one of the few cases which discusses and applies the definition of special government employee. However, even in this case, the court failed to address the "employee" issue and failed to provide any definitional assistance as to this term. Thus, the researcher is left to examine the definition of "employee" provided in 5 U.S.C. Section 2105(a), analogize that to the definition of special government employee, and hope that Title 5's definition is applicable.

Additionally, although several agencies publish opinions that discuss and interpret the conflict-of-interest laws, such as the Office of the Attorney General (AG), the Office of Legal Counsel for the Department of Justice (DOJ), and the Office of Government Ethics (OGE), these opinions are often difficult to access. They are also poorly indexed and ineffectively abstracted.

For example, OGE opinions are organized according to the year in which they are published and the statute to which they pertain. The opinions are not organized according to the specific issues with which they deal. Therefore, unless a person is interested in only one or two particular statutes, it becomes necessary to examine virtually all of these opinions.

In order to obtain copies of these memorandum opinions, it is necessary first to send away to the OGE's office in Washington for an index of its opinions. This index must then be reviewed in great detail in order to determine which opinions are potentially applicable to any given situation. Finally, a copy of a particular opinion may be requested by mail from OGE.

Commercial concerns also publish various interpretations of the conflict-of-interest laws. The Washington Service Bureau, for example, publishes The Government Ethics Reporter. However, even though the

University of Southern California is a federal document depository, it does not receive copies of OGE memorandum opinions. Nor does it have access to the Government Ethics Reporter.

The Los Angeles County Law Library with more than one million volumes also receives neither of these publications.

Finally, many of the opinions dealing with the exact same subject matter reach totally contrary conclusions.

The variety of interpretations on the part of different Federal agencies of the same terms, the lack of clarity in their definitions, and the difficulty in obtaining copies of advisory opinions combine to make it difficult for any individual serving as an advisor to the Government to understand what type of conduct is prohibited. The layman with the best of intentions may unintentionally risk being subject to criminal sanctions for his conduct.

VI. CONCLUSION

In summary, Mr. Chairman, we believe very strongly in the effectiveness and appropriateness of soliciting the advise of university based experts by the Federal Government. Universities have an ethical obligation to make this cost-effective means of obtaining valuable information and advice available to the Government.

The University actively supports the efforts of this committee to capitalize on the experience of the past twenty-five years since FACA was first enacted. We believe that now is the appropriate time to strengthen the Act, and we join with you today in your efforts. We also will work with you to help fully focus the research communities' mind on this important issue.

However, we also believe that Congress has an ethical obligation to provide us with clear guidelines and adequate forms of notice and protection in order that we may properly advise our researchers and faculty members as to the standards of conduct expected of them and the consequences of their service.

DRAFT

EXHIBIT I

Dear Faculty Member,

Recent experience on the part of some of our senior research faculty has alerted us to the problems that may arise as a result of your service on any committee or other group which renders advice to any agency of the Federal government.

In order to ensure that you and the university are adequately protected, it is appropriate for you to ask certain questions of the individuals appointing you to any such committee. These questions should include, but are not necessarily limited to the following:

1. Is the committee chartered the Federal Advisory Committees Act (FACA)?

2. If it is chartered, what are the specific rules and regulations which affect your membership and the conduct of the panel's work?

3. If it is not chartered under FACA, how was that determination made and by whom?

4. What will my employment relationship to the

government? Am I a "special government employee" or a non-government advisor? How was that determined?

5. What are the guidelines for me and/or my employer proposing to do research or similar activities in any area related to the work of the committee?

6. What financial and other disclosures will I be required to make?

If you have any questions regarding these suggestions, please contact ____________________________

____

Very truly yours,

STATEMENT OF BRIAN C. MURPHY, CHAIRPERSON, FEDERAL BAR ASSOCIATION SELECT COMMITTEE ON THE FEDERAL ADVISORY COMMITTEE ACT

Mr. Chairman, on behalf of the Select Committee on the Federal Advisory Committee Act (FACA) of the Federal Bar Association (FBA), I thank you for giving me the opportunity to appear before you today to discuss issues raised by S. 2721, "The Federal Advisory Committee Act Amendments of 1988."

We of the FBA Select Committee very much appreciate your and Senator Levin's diligent efforts, as well as those of Senator Roth and the members and staff of the Governmental Affairs Committee, to improve the operation of the Federal advisory committee system. Our FBA Select Committee is very pleased indeed to have had the opportunity to work with you on matters of such importance to effective government.

The Select Committee itself is composed of lawyers and professional managers from the public and private sectors who have considerable experience and interest in the operation of the Federal Advisory Committee Act. It is a privilege to be invited to express their views today.

Coverage of Meetings of State and Local Government Officials with Federal Officials

The Select Committee is aware of the tensions in Federal law between the requirements of FACA for chartering and open meetings on one hand and, on the other, by the requirements imposed elsewhere by Federal laws on Federal officials to meet regularly with State and local government officials to discuss shared programs.

The differing requirements have often placed Federal agencies in the difficult position of being required to consult regularly with government officials at the state and local levels, while fully complying with the chartering and open-meeting requirements of FACA in doing so.

For example, the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. Section 3102, 91 Stat. 983, 1977), requires consultations by the U.S. Department of Agriculture with state and local governments in recognition of the special relationship between the department and land grant colleges and universities. The Act provides, in pertinent part, that:

"The purposes of this title are to-

...(3) increase cooperation and coordination in the performance of agricultural research by Federal departments and agencies, the States, state agricultural experiment stations, and user groups."

Another department has expressed its frustrations on the issue of Federal, state and local consultations under FACA, as follows:

"...Programs such as the Federal-Aid Highway Program and the air pollution program under the Clean Air Act are examples of the many programs which require close coordination between state and local government officials and Federal officials to ensure their effective planning and implementation. In many cases, the most effective means of carrying out the necessary coordination is through meetings. Since these groups, when they meet, often develop advice or recommendations which are utilized by the Federal Government, the FACA is interpreted to apply. However, these meetings on shared programs are very closely analogous to working meetings within the Executive Branch on purely Federal programs which the FACA does not cover.... The number of meetings held with State and local government officials and the fact that they often must be held on short notice makes compliance with the FACA virtually impossible."[1]

Many other similar examples could be cited.

The Select Committee feels that Congressional clarification of the precedence of these divergent requirements would be helpful.

Speaking personally, and not on behalf of the Select Committee, I would like to suggest that one possible resolution would be for Congress to provide an exclusion from FACA coverage for any group composed of a combination of Federal, state and/or local government officers or employees acting in their official capacities, convened to provide advice and recommendations regarding programs that are shared by Federal, state and/or local governments. The proposed exclusion from FACA would be limited to governmental officials acting in their official capacities on shared programs and would not extend to interest groups representing the officials.

Under this approach, meetings involving Federal, state and local government officials would not be exempt from FACA when the state and local officials are themselves acting like interest groups, such as when they are lobbying Federal officials for funds to build state highways.

However, I believe that an appropriate exclusion could be crafted that would be limited to official interactions involving shared programs at the Federal, state and local levels.

Conflict of Interest Standards for Federal Advisory Committee Members

The Select Committee accepts at the outset that there is nothing inherently improper in members of advisory committees having conflicts of interests. To the contrary, it is generally helpful to the achievement of fair balance (and required by Section 5(b)(2) of S. 2721) if the members bring a range of points of view to the deliberations of the committee.

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[1] U.S. Department of Transportation memorandum from Linda Heller Kamm, General Counsel, to Richard Neustadt, White House Domestic Policy Staff, January 5, 1979.

What is needed is a duty to disclose the conflicts of interest, which is required by Section 10(b)(5) of S. 2721.

However, the Select Committee is concerned that prospective advisory committee members not be discouraged from serving because of onerous or intrusive paperwork requirements.

Currently there is a diversity among Federal agencies as to conflict of interest requirements imposed on members of Federal advisory committees, as well as a lack of uniformity concerning the classification of committee members as special government employees or some other category.

The Select Committee feels that there should be a special body of conflict of interest rules applicable to persons who serve on advisory committees, consisting essentially of a duty to disclose information relevant to potential conflicts of interest.

These issues are currently under study by the Administrative Conference of the United States (ACUS), an independent Federal agency that is also a Federal advisory committee chartered under FACA, with the broad mandate to promote fairness of Federal administrative processes and to identify causes of inefficiency in those processes.

Definitions

I would like now to comment on some of the definitions in S. 2721.

The Select Committee is concerned about the use of the word "utilize," which appears without definition in Section 3(2)(B) and (C), and throughout S. 2721.

"Utilize" is used with "establish" throughout S. 2721, when the text is referring to advisory groups that are established by the U.S. Government. The connotation of "utilize", however, is unclear and would benefit from definition by the General Services Administration in its Federal Advisory Committee Management regulations (41 CFR Part 101-6).

In addition, the Select Committee feels that the phrase appearing in Section 12 (f) (2) (Page 21 of the "Text of Federal Advisory Committee Act if Amended by S. 2721"), "for advisory committees established or utilized by the agency," should be deleted as unnecessary.

The Select Committee feels that the term "meeting" in Section 3(5) reflects an inappropriate application of the Government in the Sunshine Act (5 U. S. C. Section 552b, 90 Stat. 1241, 1976) to the Federal advisory committee process. It provides that the term "meeting" includes any interaction between a majority of advisory committee members at which the substantive business of the committee is discussed or any interaction between members of a subcommittee or subgroup.

However, this approach invites abuse, as seen in the recent attempt by the National Economic Commission to close its meetings when half or fewer of its members attend meetings.

As an alternative, the Select Committee recommends that "meeting" be defined to include any interaction of committee members or a subgroup of committee members who are authorized to conduct business on behalf of the full committee.

This reformulation would address the problem of so-called "executive" advisory committees which meet behind closed doors in making decisions for full committees.

The Select Committee is also concerned about the definition of "subcommittee" in Section 3(3). The phrase, "whether or not its members are drawn from the parent committee," could be interpreted to encourage tacitly the membership in a subgroup of persons who are not on the parent committee. Although this may be appropriate in exceptional circumstances, the Select Committee suggests that the phrase be deleted.

Coverage of One-Time Meetings

Finally, I would like to bring to your attention the views of Select Committee Vice Chairperson (and former law professor) Michael H. Cardozo concerning the application of FACA to groups that meet just one time.

Professor Cardozo prepared a comprehensive report on FACA in operation for the Administrative Conference of the United States. In Recommendation 80-3 (1 CFR 305.80-3, 1980), ACUS took the position that,

"Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to ad hoc, unstructured, noncontinuing groups, and that GSA's guidelines should make this clear."

Thank you, Mr. Chairman. I would be pleased to try to answer any questions that you may have.

JOHN GLENN, OHIO, CHAIRMAN

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JIM SASSER, TENNESSEE
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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

October 14, 1988

Mr. Brian Murphy
Chairperson, Federal Bar Association Select
  Committee on the Federal Advisory Committee Act
1815 H Street, N.W.
Washington, D.C. 20006-3604

Dear Mr. Murphy:

We would like to take this opportunity to thank you for your testimony at the October 5 hearing on S. 2721, the Federal Advisory Committee Act Amendments of 1988. Your comments on S. 2721 were appreciated. We would like you to respond to the following questions, which we were unable to ask you at the hearing.

1. In his testimony, Mr. Longo stated that there is a "chilling effect" on efforts by potential advisory committee members to seek information about the applicability of FACA and conflicts of interest laws. What do you think should be done to avoid a "chilling effect" for potential committee members and ensure that there is a free flow of information regarding applicable laws and standards of behavior?

2. Do you agree with Mr. Longo's suggestion that FACA should be amended to require agencies to send a formal "Letter of Request to Serve" which would explicitly state that they are being asked to serve on a FACA committee, and that their conduct may be subject to certain Federal laws and regulations?

3. One of the most challenging things about drafting S. 2721 was sorting through the contradictory advice we received. For example, both you and Ms. Fede would like us to delete the proposed requirement that all committee members file some sort of conflict-of-interest form -- Mr. Glitzenstein would like us to make these conflict-of-interest forms available to the public. How should we reconcile the conflicting needs for open government and a workable, enforceable statute when drafting this bill?

Again, thank you for your testimony. We appreciate the work you have done for the Committee on the Federal Advisory Committee Act Amendments of 1988, and look forward to working with you on them in the future.

Sincerely,

John Glenn
Chairman
Governmental Affairs
  Committee

Carl Levin
Chairman
Subcommittee on Oversight of
  Government Management

Federal Bar Association

November 22, 1988

The Honorable John Glenn
The Honorable Carl Levin
United States Senate
Washington, D.C. 20510

Dear Senators Glenn and Levin:

Thank you for your letter of October 14, 1988 and for your questions relating to my testimony at the hearing on October 5, 1988 concerning S. 2721, a Bill To Amend the Federal Advisory Committee Act (FACA).

On behalf of the Federal Bar Association (FBA) Select Committee on the Federal Advisory Committee Act, I would like to answer your questions as follows:

1. You have asked what should be done to avoid a "chilling effect" on efforts by potential advisory committee members to seek information about the applicability of FACA and conflict of interest laws and to ensure that there is a free flow of information regarding applicable laws and standards of behavior for advisory committee members.

At the outset, it is not clear to our members that such a "chilling effect" is widespread.

But, in answer to your question, it is important to distinguish what would be appropriate for prospective members of a lawfully chartered advisory committee from what would be appropriate for an unchartered advisory committee that exists in fact but does not follow the requirements of FACA.

For a properly chartered advisory committee, the FBA Select Committee feels that the best approach to avoid a chilling effect would be the education of prospective advisory committee members about conflict-of-interest rules, open-meeting requirements the purposes of the committee, etc. This could be done either by the agency sponsoring the committee or by GSA, or by both.

One possible approach would be for GSA to encourage agencies to advise potential advisory committee members, either when the agency staff contacts them to ascertain whether they are available to serve, or in a letter of invitation to serve, regarding:

(a) FACA requirements concerning open meetings, public participation, etc; and

(b) Applicable conflict-of-interest rules for Federal advisory committee members.

We understand that many agencies and departments already follow similar procedures in the appointment of potential advisory committee members.

For those that do not, we understand that GSA plans to encourage that agencies do so as part of planned agency training in advisory committee management. We further understand that GSA is developing an informational booklet about FACA, to be distributed to senior management on a governmentwide basis, which will inform managers regarding FACA's requirements and encourage compliance.

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In our view, to accomplish this, agency officials should contact prospective advisory committee members to ascertain whether they are available to serve and, if so, notify them that they are subject to FACA and to specific conflict-of-interest rules, detailing the relevant requirements. We feel that such a notification process should be institutionalized through training of committee management officers and other appropriate agency staff members either by the agencies themselves or by GSA.

However, if the advisory committee about which the information is being sought has not been properly chartered under FACA, then, of course, the need for accurate information about FACA and related rules becomes all the more urgent. In such a case, it would be very difficult to convey the needed information to the intended parties because there would not likely be an easy way to identify them.. But this problem would be addressed to some extent by broad education within Federal agencies about FACA and conflict-of-interest rules. Of course, this could help in situations of inadvertence but not where there was purposeful evasion of the act.

2. You have asked whether FACA should be amended to require agencies to send formal "Letters of Request to Serve" to prospective committee members, which would explicitly state that they are being asked to serve on a FACA committee, and that their conduct may be subject to certain Federal laws and regulations.

The Select Committee feels that this would be a useful practice, which should be encouraged by individual agencies and/or by GSA, but we do not believe that an amendment to FACA is necessary. Instead, the practice should be encouraged as part of professional staff training within the agencies or by GSA.

3. You have asked how to reconcile the seemingly conflicting opinions given at the October 5, 1988 hearing concerning the proposed requirement that all committee members file some sort of conflict-of-interest form.

It should be borne in mind that most members of advisory committees are selected because their affiliations qualify them to deal with the subject of the committee's concern. Their "interest" may well be complementary, and not in conflict.

The Select Committee endorses a policy of requiring agencies to obtain from advisory committee members the disclosure of all affiliations relevant to the work of the advisory committee, but without requiring disclosure of the value of holdings.

The Select Committee feels that the public interest would be served if a simple disclosure statement listing relevant affiliation and financial interests were developed. It would not ask for information as to the value of assets. Such a form should be disclosed to the public and should be required of all advisory committee appointees. This short statement would be distinct from the full disclosure form presently required of special government employees, which is not disclosed to the public.

It may be useful to note that Mr. Eric Glitzenstein and Ms. Roberta Fede, who testified at the October 5, 1988 hearing, are members of the FBA Select Committee and have told me of their willingness to work with the Governmental Affairs Committee in crafting a workable and effective disclosure form. I certainly would be pleased to do so as well.

We assume that the Office of Government Ethics would also be available to contribute toward a workable resolution of this issue.

The FBA Select Committee is pleased to have had the opportunity to comment and looks forward to working with the Governmental Affairs Committee.

Sincerely,

Brian C. Murphy

Brian C. Murphy

Chairperson

Federal Bar Association Select Committee on the Federal Advisory Committee Act

Separate Question Directed to Brian C. Murphy

You have asked how, if there were an exemption from FACA for committees composed of Federal, State and local government officials, would these groups be subject to sunset provisions affording routine assessments of their continued necessity.

Speaking for myself and not necessarily for the FBA Select Committee, it is not clear to me that a sunset provision would be necessary, since such groups would normally be convened to address very specific, time-limited tasks. When the task is completed, the group normally would be disbanded by the Federal agency to avoid any unnecessary expenditures. Committees that are no longer utilized do not induce expenditures of government funds, and so sunset provisions are not needed to ensure their termination.

Furthermore, if an abusive practice did come to light and the sponsoring agency for some reason did not take steps to correct it, it is likely that OMB would have the authority to rectify the situation, if Federal funds were being used by the group.

STATEMENT OF ROBERTA R. FEDE
BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
OCTOBER 5, 1988

Mr. Chairman, I thank you for the opportunity to testify before the Senate Governmental Affairs Committee. I am testifying as a private citizen serving as president of the Federal Advisory Committee Management Association (FACMA), a group of professional committee management officers from sixty Federal agencies who deal with management and oversight of advisory committees.

I commend the Committee for your efforts to clarify the Federal Advisory Committee Act (FACA), and I appreciate your receptiveness to earlier written comments which FACMA and others have made on the proposed amendment. The Federal Advisory Committee Act has served us well, but its language is broad, and its provisions have been subject to varying administrative and judicial interpretations. In fact, after 16 years of implementation, agency compliance is sincere but not uniform, because agencies differ in interpreting specific provisions of the Act.

The proposed amendment will focus on some troublesome aspects of FACA such as coverage, balance, and conflict of interest questions. It will also give agencies a mechanism for terminating statutory committees which have outlived their usefulness. However, several provisions of the amendment continue to concern the advisory committee community, and I would like to focus more closely on those provisions.

Section 2(b)(9) of the Act, as amended, would require that to the greatest extent practicable, an advisory committee should conduct all business through meetings. Hopefully this will not eliminate the use of conference calls or materials mailed out for comment, since they can save an agency travel and per diem costs. Some agencies are under tight Congressional ceiling restrictions and must seek to save costs where possible. Perhaps having conference call summaries and comments received from advisory committee members available to the public could alleviate this restriction.

The amendment, as written, will alter the advisory committee community's general understanding that all formal subcommittee meetings must comply with the openness and public access provisions of FACA. Most agencies publish notice of formal subcommittee meetings in the Federal Register and the public may attend. Under the amendment, as I understand it, only subcommittees which render advice directly to a Federal agency or official will be required to comply with these provisions of FACA.

Since one of the goals of FACA is openness and public access, then a more consistent approach would be to announce all formal subcommittee meetings in the Federal Register and open them to the public. A great deal of substantive work is done in such sessions. In fact, in very large committees, virtually all substantive work is done by subcommittees. The full committee or executive committee simply ratifies their recommendations and forwards them to the agency. I would suggest such coverage should extend only to formal subcommittee meetings and not to informal research, data gathering and drafting sessions or site visits. These objectives are accomplished under the current wording of FACA and are further clarified by GSA regulation. I recommend retaining the current language of FACA.

This brings me to a concern over the amendment's definition of a meeting as "any action between a majority of committee members."

This would exclude formal subcommittee sessions, and it appears to exclude executive committee sessions as mentioned above. In large committees, it is common for the chairmen of the subcommittees to comprise an executive committee. It does not necessarily constitute a numerical majority of committee members, but the executive committee receives and ratifies the advice of the subcommittees and passes the advice to the agency.

Because executive committee sessions would not be considered a "meeting," under the amendment's definition, they would also be exempt from the openness and public access provisions of FACA. Under these terms, large committees which meet in subcommittee and executive sessions would never actually hold a "meeting." They could not render advise to an agency, because this requires a "meeting." It becomes very costly for agencies to convene large committees in one place. For instance, the Radio Technical Commission for Aeronautics, a utilized group, has several hundred members serving on specific technical subcommittees. Their recommendations are forwarded to the executive committee, which in turn makes recommendations to the Federal Aviation Administration. Under the amendment, such committees would be required to hold general membership meetings, at considerable cost to the Federal Government.

Perhaps the dilemma could be resolved if the definition of a meeting were broadened to include formal, substantive sessions of subgroups or subcommittees as well as executive committee sessions, whether or not a majority is present, if their purpose is to act on behalf of the full committee. Another option would be to leave the precise definition to GSA regulation. The Final Rule on Advisory Committee Management (published December 2, 1987) gives adequate guidance, not by defining a meeting but by defining what types of interactions are exempt from coverage.

Committee Management Officers favor the establishment of uniform guidelines regarding ethics and conflict of interest matters for advisory committee members. However, there appears to be an internal inconsistency in the amendment's treatment of financial disclosure. The amendment states in Section 6(b)(4) that agency heads shall determine whether members are to be appointed as Special Government Employees or as representatives of non-Federal interest groups. It is the opinion of the Office of Government Ethics that members serving in a representational capacity need not complete disclosure forms. Yet Section 10(c)(5) requires that all prospective members shall be subject to financial disclosure prior to their appointment.

The amendment does not specify whether these financial disclosure statements would be available to the public. Special Government Employees are protected by the confidentiality amendment, but we need to clarify whether or not others would be subject to public scrutiny. Frankly I don't know what impact public financial disclosure would have on a person's willingness to serve on an advisory committee. It would certainly have a chilling impact if they were required to state a full disclosure of financial assets. Several agencies presently require all potential members to complete a short form listing assets and affiliations which might cause a conflict, but the forms are not available to the public.

In addition, I question whether we should impose disclosure requirements on outside, pre-existing groups which may be utilized by a Federal agency for advice. The requirement would be burdensome and unnecessary because the Government solicits their advice as representational groups, not as individuals. The members are not appointed by agency officials, and I would suspect that we might lose the advice from such groups if they were required to comply with the financial disclosure aspects of the amendment.

Two final concerns are the annual report requirement and the records management provisions of the proposed amendment. The President's Annual Report to the Congress on Federal Advisory Committees is a most useful document, and I would strongly urge that agencies continue to submit data to GSA for one comprehensive annual report. Separate reports to the Congress from approximately 66 agencies would require significant additional staff time and preparation costs and they would provide no common source of reference and comparison for Government officials or the public.

Reports to Congress have to be cleared throughout each agency. Since agencies historically have a propensity to be late with reports to Congress, this could hinder GSA in its efforts to put together a summary report. The comprehensive annual report is our only source of Government-wide information on advisory committees. It is well prepared and is used by agency managers as a reference for committee information and statistics. I recommend that it be continued in its present format.

Members of the advisory committee community are in complete agreement that records management should be defined by GSA regulation, using National Archives and Records Administration guidelines, rather than by statute.

In summary, I am pleased that the Senate Governmental Affairs is exercising its oversight function with attention to the Federal Advisory Committee Act. I hope these comments on the proposed amendment will be helpful, and I will be pleased to work with the Committee staff in further clarifying the areas I have mentioned in my testimony. Thank you.

RESPONSE TO QUESTIONS FROM COMMITTEE ON GOVERNMENTAL AFFAIRS

QUESTION 1. In his testimony, Mr. Longo stated that there is a "chilling effect" on efforts by potential advisory committee members to seek information about the applicability of FACA and conflicts of interest laws. What do you think should be done to avoid a "chilling effect" for potential committee members and ensure that there is a free flow of information regarding applicable laws and standards of behavior?

I was very surprised by Mr. Longo's testimony concerning the lack of communication between agencies and prospective advisory committee members. The Department of Transportation writes prospective members to ask about their willingness to serve and includes the name and telephone number of a contact person in the Department who is knowledgeable about the particular committee for which the person is being considered. The nominee is encouraged to call or write if questions occur.

Since the hearing, I have contacted committee management officers in a number of agencies, and all indicated that they encourage communication and questions from potential committee members. I cannot understand the unwillingness of an agency to communicate as fully as possible with a potential member, unless the committee has not been chartered. From subsequent conversation with Mr. Longo, his statement appears to apply to such situations.

However, if insufficient communication of information exists, it is a management problem which must be handled at the agency level. It cannot be remedied by FACA or GSA regulation.

To aid the agencies, perhaps GSA or the Office of Government Ethics could develop a brochure to be sent to all potential advisory committee nominees, outlining the significance of FACA, conflict of interest laws and disclosure requirements and responsibilities.

GSA has also offered to establish a short briefing which could be presented to new committee members at agency request on a reimbursable basis. This could be most helpful in aiding agency sponsors who may be unsure of the full applicability of conflict of interest and disclosure requirements.

QUESTION 2. Do you agree with Mr. Longo's suggestion that FACA should be amended to require agencies to send a formal "Letter of Request to Serve" which would explicitly state that they are being asked to serve on a FACA committee, and that their conduct may be subject to certain Federal laws and regulations?

I support the requirement for a letter to all potential members which includes information regarding FACA, conflict of interest and disclosure requirements. However, I do not feel there is a need to amend FACA. GSA could recommend or require that agencies develop such letters.

Of course, this solution does not address the area of unchartered committees where it appears that communication between the agency officials and potential members is tenuous and not monitored. If a committee is unchartered, neither FACA nor GSA regulation will have an impact on its operations.

QUESTION 3. One of the most challenging things about drafting S. 2721 was sorting through the contradictory advice we received. For example, both you and Mr. Murphy would like us to delete the proposed requirement that all committee members file some sort of conflict-of-interest form -- Mr. Glitzenstein would like us to make these conflict-of-interest forms available to the public. How should we reconcile the conflicting needs for open government and a workable, enforceable statute when drafting this bill?

Mr. Murphy and I have discussed this issue at length, and we are not opposed to a requirement that all appointed members file a simple disclosure statement which would list relevant affiliations and financial interests. The Department of Education uses such a form (copy attached).

If a short statement, similar to DOE's was used, I do not oppose disclosing its contents to the public. My concern is that disclosure be uniform for all advisory committee appointees. The present exemption from disclosure for Special Government Employees would create an untenable situation for committee sponsors. If all appointees were required to complete a short disclosure form, FACA could require that it be available for public information, and the full disclosure form presently required for SGEs would remain exempt.

From my experience with the daily operations of committee management, I do not feel it is workable to include utilized groups under the disclosure umbrella. The Government does not appoint the members, and it seeks the advice of the utilized "group," not its individual members. Hence, if one member did not complete the form, would this mean the Government would be unable to utilize the group for advice?

In some instances the Government utilizes a group which does not have fixed membership. Member groups simply send representatives to the meetings. For example, the Federal Aviation Administration utilizes the Radio Technical Commission for Aeronautics which listed 791 representatives who attended meetings in FY 1988. Must an agency require such representatives to fill out disclosure forms before attending and participating in the meetings of a utilized group? The requirement would be unworkable. I recommend that the disclosure requirement only apply to committee members who are appointed by Federal officials. Utilized groups should be exempt.

As you know, Eric Glitzenstein, Brian Murphy and I work together on the Federal Bar Association's Select Committee on the Federal Advisory Committee Act. Perhaps we could work with the committee staff to dedvelop a workable position on the disclosure issue. I would also suggest that the Office of Government Ethics be consulted. From past FBA discussions, I am quite confident that a consensus could be reached on filing disclosure forms and on the general issue of public disclosure. The Senate Governmental Affairs Committee must finally decide if public disclosure is worth the potential chilling effect on advisory committee service which some fear.

QUESTION TO ROBERTA FEDE

1. Your testimony advocates the continued use of a single annual report from GSA to the Congress rather than a series of summary reports from individual agencies. Given GAO's findings as to inconsistencies in GSA'S preparation of this annual summary report, how would you guarantee that such inconsistencies do not repeat themselves?

GSA's annual report to the Congress is a most valuable source of comparative statistics on Federal advisory committees. The GAO audit revealed that the report contains less statistical information than earlier reports, but statistical information without narrative can be misleading.

For example, a list of committees holding no meetings is meaningless without backup data for each committee. The two DOT committees which GAO cited in their testimony on October 5, have not met because Congress mandated in DOT's appropriation bill that no funds would be spent on these two statutory committees. Other committees may be newly formed or may meet only once a year, but may just miss the deadline for the annual report. This means the committee will meet twice the following year. It is impossible to explain each and every circumstance. Therefore, agencies find that such statistics don't fairly represent the actual situation, and they have encouraged GSA to delete such misleading data.

Another misleading chart which has been deleted from the report is one which took cost for each committee and divided it by the number of members to show a "total cost per member." This led to the erroneous conclusion that members were being paid large sums which were, in fact, costs for overhead, Federal staff costs, etc.

Agencies are pleased that GSA has limited its statistics to meaningful data, and we commend GSA for their efforts to update and improve the annual report. Individual agency reports would be devoid of any agency comparison data.

Individual agency reports to Congress are much more costly and require much more staff time than reports to GSA. The agency clearance process is far more extensive for reports to Congress, and formatting with charts, graphs, etc. means vastly increased staff preparation time. Agencies do not have a good record for timely reports to Congress. Since GSA will be dependent on agency reports for preparation of their summary report, I fear that we will lose the benefit of having a timely comprehensive report.

Eliminating inconsistencies and ensuring that GSA's annual report is of the highest quality is a continuing question of agency liaison and dialogue with GSA. GSA has recently established an interagency committee with members from approximately 20 agencies. One of its subcommittees, chaired by the CMO at HHS, has given GSA considerable input toward the 1988 annual report, and I am confident that the interagency committee will continue to have a significant impact on future reports.

CONFIDENTIAL STATEMENT OF EMPLOYMENT AND FINANCIAL INTERESTS

(For use by Special Government Employees)

PART I - TO BE COMPLETED BY EMPLOYING ORGANIZATION

(Organization completes Parts III & IV after appointee completes Part II)

Last, First, Initial)		BIRTH DATE *(Month, Day, Year)*
ANIZATION LOCATION *(Principal Operating ponent, Bureau, Division)*	PERIOD OF APPOINTMENT IN THIS PRINCIPAL OPERATING COMPONENT FROM TO	EST. NO. DAYS SERVICE TO BE PERFORMED

PART II - TO BE COMPLETED BY APPOINTEE

Information to Appointee: *Completion of this form is required for all consultants and for other persons who work 130 days or less a year identified by the head of the principal operating component. The information to be furnished on this form is required by Executive Order 11222 and the regulations issued thereunder. The information you disclose will be used to determine whether a conflict exists between your employment and financial interests and the performance of your services for the Government. The information will be held in confidence and will not be disclosed except as the Director, Office of Personnel Management or the head of the principal operating component or designee may determine for good cause shown. The information may be used: a) by a Federal, state or local agency when there is an indication of a violation or potential violation of law; b) by a Federal agency in deciding on the hiring or retention of an employee or other benefit; or c) for other routine uses published in accordance with 5 USC 552a. Unless you provide the information requested on this form, the organization will not be able to utilize your services.*

Information is not required relating to an employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise. Educational and other institutions doing research and development or related work involving grants from or contracts with the Government are deemed to be "business enterprises" for purposes of this report and should be included.

FEDERAL GOVERNMENT EMPLOYMENT — *List all other Federal agencies and other organizational elements of this Department in which you are presently employed. Please specify the organization in as much detail as possible. IF NONE, WRITE "NONE."*

AGENCY OR ED ORGANIZATION	LOCATION *(Street, City, State)*	TITLE OR KIND OF POSITION	APPOINTMENT PERIOD		EST. NO. OF DAYS
			FROM	TO	

NON-FEDERAL EMPLOYMENT — *List all corporations, firms, state or local government organizations, research organizations, and educational and other institutions, domestic or foreign, in which you are serving as employee, officer, member, owner, trustee, director, expert, advisor, or consultant, with or without compensation, including on a part-time or seasonal basis. IF NONE, WRITE "NONE."*

NAME AND LOCATION OF ORGANIZATION *(City and State)*	KIND OF ORGANIZATION *(e.g. Manufacturing, research, insurance)*	TITLE OR KIND OF POSITION

FINANCIAL INTERESTS — *List all organizations in which you, your spouse, minor child, partner, or an organization with which you are connected have financial interests which relate directly or indirectly to your consultancy duties. IF NONE, WRITE "NONE."*

NAME OF ORGANIZATION	KIND OF ORGANIZATION *(Manufacturing, storage, public utilities, etc.)*	NATURE OF INTEREST AND IN WHOSE NAME HELD

I CERTIFY *that the statements I have made are true, complete, and correct to the best of my knowledge and belief.* **I UNDERSTAND** *that if, during the period of my appointment, I undertake a new employment I must promptly file an amended statement, and I must also report any new financial interest acquired during this period if related directly or indirectly to my consultancy duties.*

(Signature)

(Date Signed)

PART III – TO BE COMPLETED BY EMPLOYING ORGANIZATION

ESTIMATED NO. OF DAYS ON WHICH SERVICES ARE TO BE PERFORMED DURING THE APPLICABLE 365 DAY PERIOD *(See FPM 735-C-2, para. d)*:

_____ (1) With this principal operating component
_____ (2) With other ED components
_____ (3) With other Federal agencies
_____ SUM OF (1), (2) and (3) ABOVE

C. TOTAL NUMBER OF DAYS

(SUM OF A AND B): _______________

NUMBER OF DAYS ALREADY WORKED DURING THE APPLICABLE 365 DAY PERIOD.

_____ (1) For ED
_____ (2) For other Federal agencies
_____ SUM OF (1) and (2) ABOVE

D. FOR APPLICABILITY OF CONFLICT OF INTEREST STATUTES *(See FPM 735-C)*, APPOINTEE IS DESIGNATED AS A:

☐ SPECIAL GOVERNMENT EMPLOYEE *(If "C" equals 130 days or less)*
☐ REGULAR GOVERNMENT EMPLOYEE *(If "C" equals more than 130 days)*

PART IV – REVIEW BY EMPLOYING ORGANIZATION

e Department Regulations on Standards of Conduct, especially Sec. 73.735-1203(d).

AME	DATE	REMARKS
		☐ NO CONFLICT NOTED ☐ SEE ATTACHED
		☐ NO CONFLICT NOTED ☐ SEE ATTACHED
		☐ NO CONFLICT NOTED ☐ SEE ATTACHED

STATEMENT OF ERIC R. GLITZENSTEIN
PUBLIC CITIZEN LITIGATION GROUP

October 5, 1988

Before the Committee on Governmental Affairs
of the United States Senate

I thank the Committee for this opportunity to testify regarding the proposed Federal Advisory Committee Act Amendments of 1988. My organization, the Public Citizen Litigation Group, has litigated many of the recent lawsuits involving the application of various provisions of FACA, including current cases involving the Justice Department's use of the American Bar Association's Standing Committee on the Federal Judiciary, and the National Committee on Microbiological Criteria for Foods, which was established by the United States Department of Agriculture. Because of our extensive experience in seeking judicial enforcement of FACA's requirements, we have a valuable perspective on the problems that currently plague the statute, as well as the kinds of legislative clarification that are essential.

To begin with, I would like to applaud the Committee, and especially Senators Glenn and Levin, for revisiting FACA and embarking on the difficult but essential task of improving and strengthening the statute. As anyone who observes the workings of Washington knows, advisory committees have become an integral part of governmental decisionmaking in both the domestic and foreign policy spheres. Indeed, it sometimes seems that no national issue can be solved without the establishment or use of an advisory committee -- high level committees in operation at the moment, for example, include the bipartisan National Economic Commission, created to tell us how to reduce the federal budget deficit, the Microbiological Committee, formed by USDA to furnish advice on whether and how to make the food supply more healthy and wholesome, and the Motor Vehicle Safety Research Advisory Committee, recently formed by the Department of Transportation for the purpose of "help[ing] us formulate the motor vehicle safety research agenda for the next decade."

While federal agencies are held accountable to the public and the Congress through a host of statutory mechanisms -- such as the Freedom of Information Act, the Sunshine Act, the Privacy Act, the Administrative Procedures Act, the Federal Records Act, and the Ethics in Government Act, to name just a few, the crucial, quasi-governmental bodies known as advisory committees are, for all practical purposes, held accountable through a single legislative device -- the Federal Advisory Committee Act. Therefore, as this Committee has recognized, it is essential that FACA protect the public's compelling interests in open, balanced, and accountable advisory committees.

In Senator Glenn's remarks announcing the introduction of the proposed FACA amendments, he noted that "[t]here is still, even after 16 years, considerable confusion concerning the interpretation of the most fundamental provisions of the act." He also observed that "portions of the act have been criticized by several Federal court judges called upon to interpret its provisions and Congress' legislative intent," and expressed his dismay over the fact that there is "continued litigation over basic questions such as whether a specific group is an advisory committee as defined in the act."

We wholeheartedly agree with Senator Glenn that those attempting to enforce and interpret FACA currently confront an intolerable level of confusion and ambiguity regarding basic features of the law. Likewise, we strongly believe that the satisfactory resolution and clarification of these issues must be the yardstick by which any effort to amend the law is appraised. When judged against this yardstick, we are compelled to conclude that, while the proposed amendment makes some useful changes, it does not represent a significant improvement on the basic issues of openness and accountability that are of greatest concern to the public. Indeed, in some crucial respects, the amendments constitute a clear step backwards from the statute as presently written and interpreted by the courts.

On the positive side of the coin, the basic framework and structure of the amendment represents a vast improvement over the confused, convoluted manner in which the existing law is organized. Thus, the amendment allocates authority over various advisory committee matters and functions in a way that is superior to the current legislation. In addition, the bill incorporates certain specific reforms that are clearly needed, such as the requirement that committee members submit conflict of interest information and the requirement that advisory committee records be maintained for a year after the committee terminates its operations.

We also strongly agree with the bill's continued coverage of advisory committees that are "utilized" by the federal government, in addition to those that are formally established. As noted earlier, Public Citizen is currently litigating a case which involves a classic example of a "utilized" advisory committee, i.e., the Justice Department's use of the American Bar Association's Judicial Nominating Committee. In that case, the government has admitted that, for many years, the ABA Committee has been a preferred source of advice on prospective judicial nominations -- indeed, the government acknowledges that the ABA Committee is the only entity outside of government that has routinely been afforded access to the names of potential judicial candidates and whose advice has been regularly solicited and used by the Justice Department and the President. If this kind of close, continuous, institutionalized advisory relationship between a governmental body and a private entity is not covered by FACA, then the law's underlying objectives of public accountability and openness are easily defeated. Stated somewhat differently, from the standpoint of the public and congressional interests that lie at the core of the Act, there is no logical distinction between advisory committees that are actually established by a federal agency and committees that may have a preexisting identity but come to be used as a preferred, special source of advice and recommendations for a governmental policy maker.

Several additional points about the general coverage of "utilized" committees, and the ABA Committee case in particular, are also worth noting. First, in the course of concluding that the ABA Committee is indeed an advisory committee covered by FACA, U.S. District Judge Joyce Hens Green relied heavily on the definition of "utilized" committees that has been developed in the regulations of the General Services Administration. As Judge Green's opinion suggests, GSA's regulations reflect, for the most part, a practical, comprehensive approach to the problem of defining which committees are covered by FACA and which are not. Rather than remove "utilized" committees from the coverage of FACA entirely, which would have a disastrous effect on the law, it makes far more sense to allow GSA to continue to craft interpretive regulations in this area, perhaps with some additional guidance from a committee report.

The other important point regarding the ABA Committee case is that, while Judge Green's conclusion was that FACA cannot constitutionally be applied to the Justice Department's use of the ABA Committee -- a ruling we are now appealing to the United States Supreme Court -- her analysis was carefully tailored to the unique function performed by the ABA Committee. In essence, Judge Green found that the Appointments Clause limits Congress' role in the process of appointing federal judges to the Senate's advice and consent power, and thus even statutes of general applicability, such as FACA, may not intrude on this process. That kind of analysis has no bearing on the vast majority of executive advisory committees and, in fact, Judge Green expressly rejected the Justice Department's far more sweeping suggestion that, under separation of powers principles, FACA's requirements generally cannot be imposed on executive branch advisory bodies. Accordingly, there is nothing in Judge Green's narrowly drafted opinion which should cause Congress to cut back on the coverage of "utilized" advisory committees.

Turning now to what we regard as the most serious flaws with the proposed amendment to FACA, the first, and perhaps most serious, such flaw is the definition of "subcommittee or subgroup" in section 3(3) of the Act. Under the definition as drafted, advisory committees can set up subcommittees or subgroups whose members do not even serve on the full committee, such subgroups can do all of the substantive work of the committee, even to the point of devising the actual advice and recommendations of the committee, and the entire process can be closed from public view so long as the full committee meets once to approve the subgroups' work product.

Under the bill's definition, in other words, it is a simple matter for federal advisory committees to turn the public's right of access into a staged performance; the clear import of the definition is that the actual development, discussion, and consensus on recommendations can be accomplished behind closed doors, as long as the public has access to a token open meeting where final recommendations are ratified and transmitted to federal officials. This kind of approach is plainly destructive of the public's right to know and would, if enacted, render FACA's ostensible requirement for openness a hollow requirement indeed. The solution to the problem is simple and straightforward, i.e., to define a subcommittee as any group of members of the full committee which is authorized to act on behalf of the committee and which reports either to the committee itself or directly to federal officials.

A related definition that is similarly destructive of the public's right to know is the definition of advisory committee "meetings" contained in section 3(5) of the Act. Fortuitously, an extremely recent controversy involving the National Economic Commission illustrates how this definition can be used to defeat the public's right of access. The Commission, which has twelve members, decided (reportedly because of the proximity of the presidential election) that it wanted to exclude members of the press and public from a series of meetings with outside experts on such subjects as international trade, tax policy, and the social security systems -- precisely the kinds of meetings that should generally be open to the public. The device chosen by the Commission was simply to ensure that only six or fewer members would be in attendance at any meeting, thus guaranteeing that a "quorum" of the full committee was not present. Based on the current statutory language and legislative history, as well as the patent absurdity of closing meetings simply because six rather than seven commission members happened to be present, the Bureau of National Affairs managed to convince the Commission to revise its position so that public access is no longer contingent on the number of commission members who show up for a particular meeting. Under the definition of "meeting" in the proposed legislation, however, the Economic Commission's approach would be perfectly permissible and the public could be completely banned from the Commission's meetings so long as fewer than seven Commission members attended any one meeting.

But that is not the only obstacle to public access that is erected by the proposed definition of "meeting": even where a majority of committee members meet they can still exclude the public by simply asserting that they are not "discussing substantive business of the committee." Thus, for example, the meetings of the Economic Commission could presumably be closed because the members are not "discussing substantive business" but are instead soliciting the views of outside experts. It could hardly be clearer that the definition of "meeting" is both overbroad and vague to the point of inviting abuse by advisory committees and agencies which do not, for an illegitimate reason or for no reason at all, want the public to have access to a particular committee meeting. Once again, the solution to the problem seems simple and unobjectionable, i.e., to simply define meetings as any interaction of either a majority of committee members or a subgroup of the committee that is authorized to conduct business on behalf of the committee. This would permit informal discussions and contacts between individual commission members but would not allow genuine meetings, such as those held by the Economic Commission, to take place in secret.

In several additional respects, the proposed amendment does not sufficiently accommodate the public's right to know. Most importantly, the statute does not require that the conflict of interest disclosures required by section 10(c)(5) of the Act be made available to the public. We believe that to require such disclosure without providing for public access is to create the quintessential paper tiger. While one may hope that the agencies creating or utilizing advisory committees will police actual or potential conflicts of interest, a far more realistic safeguard is public access.

We are currently representing six consumer organizations in a lawsuit against the United States Department of Agriculture that demonstrates the value of public disclosure. Recently, USDA created the National Committee on Microbiological Criteria for Foods and assigned to it the important responsibility of preparing comprehensive recommendations on whether, and to what extent, federal standards should be established regarding the contamination of foods by salmonella, botulism, listeria and other microorganisms. Unfortunately, the committee as constituted is completely dominated by members and associates of the regulated industry: each of the 11 non-governmental members of the committee is an employee, contractor, or consultant of the food industry. In its official Charter and Operating Procedures, however, the USDA does not acknowledge that all of these individuals have been associated with the food industry. Rather, it describes at least two of these individuals as "academic representatives," creating the clear impression that they are objective, neutral experts. It was only because of the lawsuit that the plaintiff consumer organizations -- and thus the rest of the public -- learned that these "academic representatives" have taken significant sums of money from the food industry and thus can hardly be expected to voice neutral, objective analyses. In this situation, the public obviously could not rely on the USDA to police potential conflicts of interest and there is no reason to regard this as an isolated example.

As the foregoing suggests, not only is public access to conflict of interest information vital to enforcement of the law, but it is also clear that there is no valid reason not to make such information available _if_ sensible, carefully crafted disclosure forms are developed. Certainly, public access to a comprehensive form requiring full disclosure of all conceivable financial data may be expected to deter persons from serving on committees. But the same analysis does not logically apply to an abbreviated form that merely requires members of committees to describe actual or potential conflicts of interest created by service on a particular advisory committee. And if such a form _did_ deter participation on a committee, the likely reason would be that an individual was genuinely concerned about revelation of an actual or potential conflict of interest, and thus the participation of that individual _should_ be avoided. To take the example of the Microbiological Committee, if one of the members declined to serve on the Committee as an "academic representative" because of a concern that the public would learn that he or she was closely associated with industry, we submit that that is a good rather than a bad result.

Furthermore, any perceived problems with affording public access to conflict of interest information can also be rectified by adopting common-sense rules regarding the types of disclosure forms that various kinds of committee members must submit. For instance, if an individual is formally designated as an industry representative, it would be silly to require that individual to itemize all financial or other connections he or she may have with the industry. Only if the individual is designated something other than an industry representative but in fact has substantial ties to the regulated industry would it make sense to require disclosure of the industry relationship. In sum, we believe that a sensible set of conflict of interest rules, designed especially for service on advisory committees, can and must be accompanied by a public access requirement.

There are two final aspects of the amendment that stand out as problematic to the public. One is the requirement for balanced representation, which, as Senator Glenn pointed out in his statement introducing the bill, has drawn particular fire from federal judges in its current incarnation. Unfortunately, the proposed amendment may create even more confusion regarding the requirement for balanced representation. Thus, the amendment not only fails to contain a workable definition of balanced representation (while the findings and purpose section does provide some useful clarification, such sections are never of great value to those on the front lines of litigation), but it is entirely unclear from the statute exactly how courts would even enforce the balanced representation provision embodied in sections 6 and 7 of the bill.

Thus, section 6 provides that, when a committee is established or utilized, the President or agency head shall make a determination which "contain[s] provisions to assure that the membership of the committee _will_ _be_ fairly balanced." (Emphasis added). Similarly, section 7 simply states that advisory committee charters shall set forth the "plan for achieving a balance in committee membership." The language in both of these provisions seems to suggest that the responsibility for creating balanced committees is discharged so long the President or agency head is careful to include the appropriate generic language for accomplishing balance in the committee's written determination and charter.

But what happens when a Committee as actually constituted -- _i.e._, when the specific committee members are named -- does not contain balanced representation or deviates from the written determination? Simply stated, it is easy to set out a general "plan" for accomplishing balance, but it is another matter entirely to actually include members who truly represent affected interests or do not have excessive ties to the regulated industry. To once again take the example of the Microbiological

Committee, the USDA's written determination and charter can set forth a reasonable-sounding "plan" for attaining balanced membership -- e.g., "the committee will contain representatives of all affected groups, including academics, state officials, etc." -- but that does not mean that all of the actual members chosen will not in fact have substantial ties to industry. Unless the statute imposes on the executive branch a specific, ongoing obligation for ensuring balanced representation that can and will be enforced by federal courts, then the statute's balanced representation "requirement" -- supposedly one of the cornerstones of the law -- will continue to amount to little more than empty rhetoric. As we read the amendment in its current form, it does not impose such a continuing, enforceable requirement on federal officials.

The final major problem with the bill concerns committees that carry out both advisory and "operational" functions. While the definition of "operational functions" in section 3(4) is itself rather vague, the major problem is contained in 4(c) of the Act, which provides that any committee can be entirely exempted from the statute unless it is "primarily advisory in nature as determined by the involved agency after consultation with the Administrator [of GSA]." This provision not only establishes an extraordinarily vague and subjective standard, i.e., "primarily advisory", it even goes so far as to suggest that the application of this standard is entirely committed to the "determination" of the involved agency "after consultation" with GSA. In short, the standard not only lends itself to abuse but also makes it virtually impossible for such abuses to be challenged and corrected in court.

Moreover, we believe that the bill's approach to committees serving both advisory and operational functions is inherently flawed. Comparing advisory and operational functions of any particular entity is like comparing apples and oranges; there is simply no objective, definable way of assessing whether a particular advisory function is more or less significant than a particular operational function. Accordingly, _any_ standard which makes FACA's coverage dependent on some sort of comparison of functions -- whether it be "primarily advisory" or something else -- should be discarded as excessively arbitrary and unworkable. A far superior approach would be to simply require that the advisory functions of mixed committees be subject to the basic openness and accountability requirements of the law, while excluding the operational functions from these requirements. For instance, a mixed committee could be required to meet in public when meeting to discuss or render advice but not when it is meeting for the purpose of carrying out operational functions.

In sum, the recently-introduced FACA amendments represent a helpful starting point for considering and discussing the long-overdue overhaul of FACA. Such an overhaul, however, should not actually occur unless and until it resolves the problems and ambiguities that afflict the statutory scheme as it is currently drafted and has been construed by the courts. Unfortunately, the bill, in its present form, fails to solve the major problems currently confronting litigants, agencies, and courts, and also creates some new provisions that can easily be used to deprive the public of the right to open and accountable advisory bodies. While we cannot, therefore, support the bill as introduced, we look forward to working with the Committee in the future in the ongoing effort to improve and strengthen the Federal Advisory Committee Act.

JOHN GLENN OHIO CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON. DC 20510-6250

October 14, 1988

Mr. Eric R. Glitzerstein
Public Citizen Litigation Group
Suite 700
2000 P Street N.W..
Washington, D.C. 20036

Dear Mr. Glitzenstein:

We would like to take this opportunity to thank you for your testimony at the October 5 hearing on S. 2721, the Federal Advisory Committee Act Amendments of 1988. Your comments on S. 2721 were appreciated. We would like you to respond to the following questions, which we were unable to ask you at the hearing.

1. In his testimony, Mr. Longo stated that there is a "chilling effect" on efforts by potential advisory committee members to seek information about the applicability of FACA and conflicts of interest laws. What do you think should be done to avoid a "chilling effect" for potential committee members and ensure that there is a free flow of information regarding applicable laws and standards of behavior?

2. Do you agree with Mr. Longo's suggestion that FACA should be amended to require agencies to send a formal "Letter of Request to Serve" which would explicitly state that they are being asked to serve on a FACA committee, and that their conduct may be subject to certain Federal laws and regulations?

3. One of the most challenging things about drafting S. 2721 was sorting through the contradictory advice we received. For example, both Ms. Fede and Mr. Murphy would like us to delete the proposed requirement that all committee members file some sort of conflict-of-interest form -- you would like us to make these conflict-of-interest forms available to the public. How should we reconcile the conflicting needs for open government and a workable, enforceable statute when drafting this bill?

4. Please tell us more about your current appeal to the Supreme Court over the American Bar Association's Select Committee on the Federal Judiciary. What is the Supreme Court likely to do? What are the case's implications for FACA, and what rulings or other language in the appellate decision, if any, should be addressed in legislation amending FACA?

Again, thank you for your testimony. We appreciate the work you have done for the Committee on the Federal Advisory Committee Act Amendments of 1988, and look forward to working with you on them in the future.

Sincerely,

John Glenn
Chairman
Governmental Affairs
Committee

Carl Levin
Chairman
Subcommittee on Oversight of
Government Management

QUESTIONS SUBMITTED BY SENATOR SASSER

1) YOUR TESTIMONY NOTES THAT THE DEFINITION OF "SUBCOMMITTEE" UNDER S. 2721, WOULD SIGNIFICANTLY CURTAIL PUBLIC ACCESS TO THE DECISION-MAKING PROCESS OF FEDERAL ADVISORY COMMITTEES. YOU FURTHER SUGGEST THAT DEFINING A SUBCOMMITTEE AS "ANY GROUP WHICH REPORTS DIRECTLY TO A FEDERAL ADVISORY COMMITTEE OR TO FEDERAL OFFICIALS" WOULD ALLEVIATE THE PROBLEM OF DIMINISHED PUBLIC ACCESS. DON'T YOU FEEL THAT MORE SPECIFIC LANGUAGE IS NEEDED TO PROMOTE PUBLIC ACCESS TO SUBCOMMITTEE ACTIVITIES--I.E., LANGUAGE THAT GUARANTEES THE PUBLIC A RIGHT OF ACCESS TO SUBCOMMITTEE ACTIVITIES?

2) YOUR TESTIMONY SUGGESTS THAT PUBLIC ACCESS TO FINANCIAL DISCLOSURE STATEMENTS IS VITAL TO ENSURING BALANCED REPRESENTATION ON FEDERAL ADVISORY COMMITTEES. COULDN'T SUCH BALANCED REPRESENTATION ALSO BE ENSURED BY MORE SPECIFIC REQUIREMENTS AS TO THE COMPOSITION OF FEDERAL ADVISORY COMMITTEES--I.E., REQUIREMENTS THAT FEDERAL ADVISORY COMMITTEES CONTAIN X NUMBER OF INDUSTRY REPRESENTATIVES, X NUMBER OF CONSUMER ADVOCATES, AND X NUMBER OF ACADEMIC EXPERTS?

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October 28, 1988

Senator John Glenn
Chairman
Senate Governmental
Affairs Committee
Washington, D.C. 20510-6250

Senator Carl Levin
Chairman
Senate Subcommittee on Oversight
of Government Management
Senate Governmental
Affairs Committee
Washington, D.C. 20510-6250

Dear Senators Glenn and Levin:

Thank you for inviting me to testify on S. 2721, the Federal Advisory Committee Act Amendments of 1988, and for your letter of October 14, 1988. My responses to the follow-up questions posed in your letter are as follows:

1. I agree with the underlying premise of Mr. Longo's statement -- that it is important to ensure that advisory committee members are familiar with the requirements of FACA and related laws. With respect to advisory committees that are formally chartered by federal agencies, the problem could be readily solved in the manner suggested by Senator Glenn at the October 5 hearing, i.e., GSA could develop a pamphlet or booklet that contains a succinct, comprehensible explanation of FACA and specifically informs committee members as to obligations under the Act.

However, my understanding of Mr. Longo's reference to a "chilling effect" relates to a much more serious problem that cannot be so easily solved -- the problem of unchartered bodies that are being intentionally operated by agencies entirely outside the coverage of the Act. In such circumstances, potential committee members are "chilled" because agencies are attempting to circumvent the requirements of the law and do not want to inform the potential committee members about the requirements of the law. In such circumstances, therefore, the underlying problem is not the inability of potential members to obtain pertinent information but, rather, the failure of federal agencies to comply with the law. The only way to get at that problem is to (1) ensure that there is ongoing, tough administrative enforcement and oversight, which has not been consistently supplied by GSA or any other component of the executive branch; (2) continue to provide the kind of Congressional oversight that has recently been furnished by the Committee on Governmental Affairs and the Subcommittee on Oversight of Government Management; and (3) ensure that FACA can be effectively enforced through litigation, which is not, by and large, currently the case.

2. Mr. Longo's suggestion is basically a good one, but its actual usefulness would depend largely on the specific contents of the formal "Letter of Request to Serve." If the letter actually laid out precise responsibilities and requirements imposed by FACA and related laws, then it could be helpful; if, on the other hand, it merely contained generalized references to FACA, it is difficult to see what it would accomplish. Such a letter, if worded properly, could also assist in enforcing the balanced representation provisions of the law. For example, any such letter should notify potential members whether they are being solicited to satisfy a specific representational requirement (e.g., to be an industry or consumer representative). That would provide some record of the agency's efforts to attain balance.

3. There are several points that are relevant to this important question, which goes to the heart of the current effort to revamp and clarify FACA. First, while total unanimity of views on a piece of legislation like FACA is not realistic, I believe there is far more consensus on the basic issues than your question suggests. For example, Ms. Fede, Mr. Murphy and I are all members of the Federal Bar Association's Select Committee on the Federal Advisory Committee Act. While each of us obviously has a different vantage point on FACA, we have, I believe, general agreement on the problems with the current law, as well as the major flaws in S. 2721. Thus, I believe there is basic consensus on such core issues as the bill's coverage of "subcommittees", the definition of "meetings", and the bill's inadequate response to the balanced representation problem.

Even with respect to the question of public access to conflict-of-interest forms -- which is highlighted in your question -- I do not believe that there is necessarily substantial disagreement. As I understand their positions, Ms. Fede and Mr. Murphy have objected to the current system, under which some advisory committee members must file unnecessarily voluminous, detailed conflict-of-interest forms, while some members are not required to file any forms at all. I wholeheartedly agree that the current system is not functioning in a sensible manner.

Rather, all committee members should file limited disclosure forms that are narrowly tailored to their service on the particular committee and to the specific interest they are purportedly representing on the committee. I have not heard any convincing argument as to why conflict-of-interest forms of that kind should not be available to the public, and, in particular, it is not my understanding that Mr. Murphy and Ms. Fede necessarily object to public disclosure in such circumstances. Thus, I believe that the conflict-of-interest issue may be a good example of how carefully drafted provisions can effectively satisfy competing concerns.

Moreover, contrary to the premise of the question, there is no inherent "conflict" between the "need for open government" and the need for a "workable, enforceable statute." Rather, these interests can and should be viewed in a complementary fashion; the public's and Congress' interest in open and accountable advisory committees can only be furthered if a workable, enforceable statutory scheme is fashioned. Indeed, a statute that is ambiguous and vague on key points benefits only those who do not want enforceable requirements. In essence, the real conflict is between the public's and Congress' interest in open and accountable advisory committees, and the countervailing interest -- which is advanced by a small but vocal minority of interested observers -- in statutory "requirements" that can be easily circumvented and do not, in any meaningful way, circumscribe the executive branch's use (and occasional abuse) of advisory committees.

The clearest example of this, as Senator Glenn noted at the hearing, is FACA's "requirement" for balanced representation. While this has been labeled one of the cornerstones of the statute, the unfortunate reality is that, as the provision is currently drafted and construed by the courts, there is in effect no balanced representation requirement in the law at all. At the hearing, Senator Glenn hypothesized an advisory committee on pesticide policy that is dominated by members of the regulated industry and excludes any representatives of environmental or consumer groups. My sense at the hearing was that all witnesses, including the representatives of OMB and GSA, agreed that such a committee cannot be regarded as "fairly balanced." However, after litigating a series of cases under the "balanced representation" provision, I am thoroughly convinced that even this hypothetical committee would not be deemed in violation of either the current law, or the strictures of S. 2721, by a federal court.

In fact, just yesterday a group of consumer and senior citizens' organizations received an adverse ruling regarding an advisory committee -- the National Advisory Committee On Microbiological Criteria for Foods -- whose composition is strikingly similar to that of the committee postulated by Senator Glenn. Thus, the Microbiological Committee was established to prepare sweeping recommendations on an issue of vital concern to consumers -- what, if any, federal standards should be adopted to protect consumers from salmonella, botulism, and other biological contaminants in foods -- but which is thoroughly dominated by the food industry and contains no direct consumer representation at all. Indeed, every single one of the non-governmental members of the Committee is an employee, contractor, or consultant of the food industry.

In ruling that this Committee does not violate FACA's balanced representation provision, United States District Judge John Garret Penn once again forcefully criticized the statute for "present[ing] various obstacles to appropriate judicial interpretation" and for failing to "apply . . . objective legal rules to the FACA." He thus joins the many other federal judges who have made it painfully clear that they have no intention of finding any advisory committee unfairly balanced under the statute as it is currently drafted. (A copy of the opinion is enclosed with this letter.)

It is now absolutely clear, therefore, that a provision for "balanced representation" is worthless to Congress and the public unless it is drafted in terms that are sufficiently specific and mandatory so that judicial enforcement is feasible and predictable. Under the current statutory scheme, there is simply nothing to deter federal agencies from stacking advisory committees with members of the regulated industry and totally ignoring consumer, environmental, and other affected public groups; the threat of a successful federal lawsuit is essentially non-existent no matter how one-sided the committee -- in the entire history of the statute, there has not been a single instance in which a federal judge has ruled that the composition of an advisory committee is illegal.

In these circumstances, therefore, the "conflict" is not between public accountability and the need for a workable statute, but, rather, between those who want a statute with meaningful, enforceable standards and those who, in effect, want agencies to have total, unfettered discretion to select the members of advisory committees. Certainly, reasonable minds can differ on how to approach drafting a workable balanced representation requirement, and any such effort will be fraught with complexity and controversy. But the alternative to drafting such a requirement is, in effect, to have no requirement at all.

4. We are currently awaiting the Justice Department's response to our appeal to the Supreme Court regarding the ABA's Select Committee on the Federal Judiciary. That response is now due to be filed on November 11 and the Court should indicate whether it will review the case by the end of November. If the Court does grant plenary review, as we anticipate, then full briefing on the merits will take place over the next several months. We believe that the district judge was clearly correct

in ruling that the ABA Committee is covered by FACA but that her constitutional analysis was simply out of step with recent Supreme Court pronouncements on the separation of powers doctrine, including the Court's decision last term upholding the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. We believe that the district court's most glaring error was in failing to recognize that the statutory exemptions to FACA's open meeting and record requirements are sufficient to protect the ABA's legitimate interest in safeguarding discussions of specific potential nominees to the federal bench.

Since the district court correctly concluded that the ABA Committee is a "utilized" advisory committee, the court's ruling does not need to be directly addressed in legislation amending FACA. Indeed, it would be useful to highlight the district court's cogent analysis of why the ABA Committee is a "utilized" committee in report language. However, in dicta, the district court apparently came to one troubling conclusion that is germane to the amendment process, i.e., that FACA's balanced representation requirement has no applicability to "utilized" advisory committees.

If that analysis is correct, it means that agencies can circumvent the balanced representation requirement merely by utilizing pre-existing private entities to obtain advice and recommendations rather than formally establishing and chartering advisory committees. To take the example postulated by Senator Glenn at the hearing, the EPA could use a pre-existing industry group to provide advice and recommendations on pesticide policy and make no effort to obtain the views of consumer or environmental groups. Accordingly, any legislation amending FACA should make it clear that the balanced representation provision applies to all advisory committees covered by the Act.

The supplement to your October 14 letter contains two additional questions, one relating to the definition of subcommittees, and the other relating to financial disclosure statements and balanced representation. My answers are as follows:

1. The public should be guaranteed a right of access to subcommittee activities, and the statute needs to be as specific as possible on this point. At a minimum, any provisions regarding "subcommittees" must make it clear that public access to subcommittee activities does not hinge on whether the subcommittee reports directly to federal officials or, rather, simply to the members of the full committee. That is the basis for the suggestion in my testimony that S. 2721 must be revised to specify that the public has access to subgroups which report directly to a full committee but not to federal officials. Another approach would be to define subcommittees in terms of

their substantive role. Thus, since the public is primarily concerned with the actual drafting and formulation of recommendations, subcommittees could be defined as "any group or body which drafts or prepares recommendations for consideration by an advisory committee or by federal officials." This would make it clear that it is the process of drafting recommendations -- regardless of whether it is done by the full committee or a subgroup -- to which the public must have access.

2. Public access to narrowly drawn, reasonable conflict-of-interest statements is vital for several reasons, including ensuring balanced representation. Thus, while creating specific requirements for the composition of federal advisory committees is essential -- as I noted above, the more specific and concrete the better --I believe that public access to conflict-of-interest statements would effectively complement, rather than substitute for, such a provision. Thus, if, as suggested in your question, the statute were to require an equal number of industry, consumer, and academic representatives, such a provision could be policed by the public and Congress only if conflict-of-interest forms were available.

To once again take the pesticides committee postulated by Senator Glenn as an example, the EPA could claim that it is creating a committee with equal numbers of consumer, industry, and academic representatives when, in fact, the "academic" or even the "consumer" representatives are on the payroll of the regulated industry. The only effective way to guard against that kind of abuse is to provide for public access to limited conflict-of-interest statements which provide data that are pertinent to the individual's service on the advisory committee.

With respect to the general question of how to strengthen the balanced representation provisions in the proposed amendment, I agree that a provision mandating specific kinds of representation -- such as industry, consumer (or other public interest organization), and academic -- would be the clearest and most easily enforced. The problem is that specific representational interests may not be relevant to each and every advisory committee; for example, it would not be necessary or appropriate to place consumer or industry representatives on National Science Foundation peer review committees.

An alternative may be to require that these specific interests be represented except where the agency makes a specific finding, in writing, that such an interest is not relevant to the functioning of the committee. The statute could also make it clear that this "finding" is subject to judicial review, perhaps employing the arbitrary and capricious standard that is applied to most agency actions.

Along with this more specific substantive standard, the legislation should mandate a system for soliciting public input regarding the composition of advisory committees. Every agency contemplating an advisory committee could simply be required to notify the public regarding the committee's general functions and objectives, and invite the public to comment on the appropriate composition and membership of the committee. This would seem to impose, at most, a minimal burden on agencies (many of whom already do this voluntarily) and I can see no legitimate objection to it. In fact, the public comments could greatly assist agencies in creating effective advisory committees, and could also provide a basis for courts to assess whether an agency has acted arbitrarily or capriciously in excluding a specific representational interest (i.e., industry, consumer, or academic).

* * * * *

Once again, thank you for inviting and considering Public Citizen's views on these important issues. I look forward to working with you and your staffs in the future on the Federal Advisory Committee Act Amendments.

Sincerely,

Eric R. Glitzenstein

ERG/ms
Enc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v. Civil Action No. 88-1959

NATIONAL ADVISORY COMMITTEE ON
MICROBIOLOGICAL CRITERIA FOR
FOODS, *et al.*

Defendants.

FILED

OCT 25 1988

Clerk, U.S. District Court
District of Columbia

MEMORANDUM

This case comes before the Court on plaintiffs' motion for a preliminary injunction.[1] Argument on the motion was heard on September 22, 1988. After careful consideration of the motion, the arguments of the parties, and the record in this case, the Court concludes that the preliminary injunction must be denied and the case dismissed.

I

On March 18, 1988, the Secretary of Agriculture established the National Advisory Committee on Microbiological Criteria for Foods (the Committee). The purpose of the Committee as evidenced by its Charter is to provide advice and recommendations on the development of microbiological criteria for foods. Charter of the Committee at 1(b). The Operating Procedures for the Committee (Operating Procedures) provide that membership on the Committee shall consist of appropriate personnel selected from the primary federal agencies having responsibility for assuring foods are safe and of acceptable quality, state and/or municipal food regulatory agencies, the food industry and academia. See Operating Procedures. Further the Operating Procedures indicate that the "Committee shall address the selection of foods and food ingredients on the basis of need for microbiological criteria that can effectively supplement and be incorporated into food protection programs of Federal, state and municipal food regulatory agencies; and development of criteria for each food for which it is determined that microbiological criteria would serve a useful purpose." Id. Additionally, "[d]uring its deliberations, the Committee shall address the continuing need for research to better understand the effects of current and emerging processing and distribution practices that may affect microbial safety and quality; and, the need to improve and develop methods for the detection and enumeration of microorganisms and their toxic agents that are important to the safety and quality of food." Id.

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[1] Pursuant to Fed. R. Civ. P. 65 (a)(2), the parties have agreed to consolidate trial of this action on the merits with the hearing of the application for a preliminary injunction.

When this suit was filed the Committee consisted of nineteen members.[2] In terms of area of expertise the Committee is composed of: two university professors, one state agriculture department official, one state department of agriculture and consumer services official, two persons employed by food research firms, six persons employed in various capacities by relevant federal agencies, six persons employed by private food companies and one individual employed by a food processors' organization. The Committee has met twice, on April 5 and 6 and on June 22 and 23, 1988. The Committee was scheduled to meet on October 20 and 21, 1988.

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[2] Effective September 30, 1988, Committee Member Kenneth M. Iwamoto, Director of Research and Development and Quality Assurance for Frionor, U.S.A., a processor and supplier of seafood products, resigned from the Committee.

Plaintiffs, a public interest organization, a consumer organization, a senior citizen research and advocacy organization, and three consumer research, education and advocacy organizations (hereinafter collectively referred to as Public Citizen), filed this suit against the Committee, the United States Department of Agriculture (USDA) and the United States Department of Health and Human Services (HHS) seeking declaratory and injunctive relief from an alleged violation of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I, based on the composition of the Committee.

II

In their complaint, plaintiffs maintain that the purpose of the Committee is to provide advice on the types of biological contaminants that present the gravest risks to consumers, the kinds of foods on which USDA and HHS should focus their attention, and the nature of the regulatory scheme, if any, the federal government should devise to respond to the health threats posed by microorganisms. It is argued that in spite of the overriding significance of these issues, the USDA has refused to appoint even a single "consumer representative or advocate to the Committee".[3] They contend that over half of the members of the Committee are employees, consultants, or contractors of the food industry, which has a direct economic stake in the kind and scope of any federal regulation of microbiological contaminants. Public Citizen argues that the Committee has violated FACA which requires that all federal advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed" and that they must not be "inappropriately influenced ... by any special interest group..." 5 U.S.C. App. I, § 5(b)(2)-(3).[4] A preliminary injunction is sought to prevent the Committee from proceeding with its work unless and until it meets the balanced membership requirements of FACA.

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[3] Plaintiffs have not provided a profile of the type of consumer advocate or representative they seek, nor have they specified the number of representatives necessary to constitute balance. They have submitted the affidavits of six individuals representing various non-profit consumer research and advocacy organizations, each affidavit states that in the affiant's opinion the consumer viewpoint is not adequately represented on the Committee. See Plaintiffs' Exhibits S-X. Additionally, two of these affiants provided the names of individuals that the affiants assert would be qualified to participate on the Committee. Plaintiffs' Exhibits S-T.

[4] The relevant portions of FACA, 5 U.S.C. § 5(b), provide that any such legislation shall: " . . . (2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee; (3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead result from the advisory committee's independent judgment. . .

In support of these assertions plaintiffs state that while there may be "conceptual and practical difficulties" in applying the "fairly balanced" requirement of FACA to some kinds of advisory committees relying on National Treasury Employees Union v. Reagan, Civ. No. 88-186 (D.D.C. February 25, 1988)(hereinafter NTEU), that these difficulties are not present in this case. Plaintiffs contend that where agency officials create an advisory committee to obtain guidance in performing a specific, discrete regulatory function, the agency cannot then allow the committee to be dominated by representatives of the regulated industry, "while entirely excluding representatives of consumers[5], whose health may be directly affected by the work of the committee". Plaintiffs' Memorandum in Support of its' Motion for Preliminary Injunction at 23. Plaintiffs insist that the absence of consumer representation on the Committee is sufficient to condemn the Committee to a finding of illegal composition. Id. at 20. Public Citizen adds that because of the overwhelming involvement of the food industry there can be no serious debate as to whether the

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[5] By letter dated May 12, 1988, plaintiffs requested that the Secretary of Agriculture Richard Lying take immediate action to appoint consumer representatives with public health expertise to membership on the Committee. Responding by letter dated June 15, 1988, Assistant Secretary Gilles denied that request, but noted that USDA would consider other individuals in the event of a vacancy. Secretary Gilles also pointed out that Committee Member Martha Rhodes, Assistant Commissioner of the Florida Department of Agriculture and Consumer Services would offer a consumer perspective to the work of the Committee. Plaintiffs submit that in addition to the fact that only a single member of the Committee has been designated to have consumer experience, that member is an employee of a state agency rather than a consumer group or organization.

Commission is in compliance with the Congressional mandate of FACA. Id.

In response defendants state that plaintiffs' motion must be denied on four grounds. First, plaintiffs have failed to demonstrate any likelihood of success on the merits since the requested relief is unwarranted because the Committee membership as presently constituted is balanced in terms of the scope of its efforts and functions it is to perform. Defendants argue that this fair balance prevents plaintiffs from showing that the Committee is inappropriately influenced by any special interest group. Second, plaintiffs have completely failed to demonstrate irreparable injury to them if the incumbent Committee continues to function. Additionally, plaintiffs have neither any legal entitlement to their own representative on the Committee nor have they demonstrated that their interests are not already represented on the Committee. Third, defendants submit that there has been no suggestion that plaintiffs have been unable to present their view to the Committee since the meetings are open to the public, therefore defendants conclude that any alleged injury is speculative and remote. Finally, defendants submit that since this field is largely unregulated, there is a substantial public interest in the development of microbiological criteria for foods to prevent death and illness from impure or contaminated foods. Defendants submit that the public interest strongly favors permitting the work of the Committee, charged with recommending regulations intended to protect the health of food consumer, to continue.

III

In order to warrant the issuance of a preliminary injunction, plaintiffs have the burden of demonstrating: 1) that they have a strong likelihood of success on the merits of their claim; 2) that they will be irreparably harmed if an injunction is not granted; 3) that the issuance of an injunction will not harm others; and 4) that the public interest will best be served by the injunction. Washington Metropolitan Area Transit Commission v. Holiday Tours Inc., 559 F.2d 841 (D.C. Cir. 1977). Even in the FACA context, the extraordinary nature of a preliminary injunction demands that the requesting party carry the burden of demonstrating irreparable harm and inadequacy of legal remedies as a basis for such relief. National Association of People with Aids v. President Reagan, No. 87-2777, slip op. at 8 (D.D.C. Dec. 16, 1987). After applying these stringent legal rules to the facts of this case, the Court is constrained to conclude that plaintiffs have failed to carry the required burden for injunctive relief and in view of the absence of any factual dispute plaintiffs are not entitled to the relief requested as a matter of law.

Since the term "balance" is not defined in the FACA, judicial inquiry in this area has turned on whether the "Committee's members represent a fair balance of viewpoints given the function to be performed." See National Anti-Hunger Coalition v. Executive Committee of the President's Private

Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C.Cir.), aff'g 557 F.Supp 524 (D.D.C.), modified, 566 F.Supp. 1515 (D.D.C. 1983)(motion for relief from judgment granted). In National Anti-Hunger Coalition, the composition of the Executive Committee was challenged because it was almost exclusively comprised of executives of large corporations. Id at 1072. The District Court held that since the Committee was designed to apply private sector expertise to attain cost-effective management in federal government, the President could legitimately select those with experience in fiscal management of large private organizations. National Anti-Hunger Coalition, 557 F.Supp. at 528. Moreover, the National Anti-Hunger Coalition court concluded that the alleged imbalances in membership are "simply irrelevant to the ability of the Executive Committee to perform its limited function fairly and impartially." Id.

In this case, the Committee is charged with addressing the selection of foods and food ingredients on the basis of the need for microbiological criteria that can be incorporated into governmental food protection programs and to confront the continuing need for research to better understand the effects of current and emerging processing and distribution practices that may affect microbial safety and quality. Thus the Court must determine whether under FACA the Committee as currently constituted is balanced in accordance with its advisory function. Plaintiff has offered no evidence that the Committee is unfit for this task.[6] The Committee is charged with a highly technical mandate which requires extensive scientific background as well as expertise in processing and distribution practices. Each of the Committee's members have extensive professional background in various aspects of food microbiology. In sum, there is no indication that the present Committee is unable to fulfill its functions.

Additionally, plaintiffs contend that the Committee is being inappropriately influenced by a special interest group, the food industry. In NTEU, the President established a Commission on Privatization to study all activities of the federal government and report on which government programs enterprises and activities are more appropriately part of the private sector. slip op. at 2. The NTEU Commission was comprised of thirteen members selected from both the private and public sectors as well as academia, but none of the Commission members represented the federal employees. Id. at 3. Plaintiffs in NTEU charged that the Commission was violative of the fairly balanced requirement of FACA since the Commission included no representative of federal employees who have a direct interest in the committee's recommendations particularly when the Commission hosts advocates of privatization only. Id. at 6. The NTEU Court concluded that "we do not find that Congress intended the 'fairly balanced' requirement to entitle every interested party or group affected to representation on the Commission." Id. at 8 (emphasis in original). The harm asserted in NTEU is very similar to the harm alleged in this case, except that in NTEU there were clearly no representatives of the plaintiffs' interests.[7] There was no finding that the NTEU Commission was inappropriately influenced even though it was dominated by the private sector because the nature of the function of the Committee governs the suitability of its members for the purpose of determining whether the Committee is balanced. In this case, there is representation on the Committee by individuals outside of industry. Further given the language of the Charter, representatives from different food industries are appropriate given the Committee's directive to study current and future distribution processes. Although plaintiffs argue that the Committee is being inappropriately influenced by the food industry, they have not offered any documented evidence that the Committee members selected from the food industry have acted improperly or exceeded the scope of the mandate of the Committee in the work that the Committee has performed to date.

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[6] Plaintiffs emphasize the statements of Kenneth Gilles before the Microbiological Committee particularly where he states: " As a committee you must resist the temptation to recommend strict standards just for the sake of appeasing certain special interest groups." Statement of Kenneth Gilles Before Microbiological Committee at 2. However, Gilles went on to state: "At the same time, you must resist the temptation not to recommend standards if they are indeed justified." Clearly the combination of these statements do not amount to a particular bias.

Finally, plaintiffs stress the fact that in their view the consumer perspective is glaringly absent from the Committee in its current form, yet plaintiffs conceded at oral argument that defendants have discretion in selecting which consumer advocate or advocates are appointed to the Committee. Presumably this accounts for plaintiffs failure to specifically state what action should be taken to provide the balance sought by plaintiffs. Notwithstanding plaintiffs' arguments in this regard, the Court of Appeals for this Circuit noted in National Anti-Hunger Coalition, that FACA confers no cognizable personal right to an advisory committee appointment. 711 F.2d at 1074 n.2. Moreover, there is no reason to believe that Congress intended to prohibit the selection of specialized advice and while different choices could have been made to accomplish the goals of the Committee, the gathering of a particular group of experts is not in itself enough to render such an advisory committee unbalanced within the meaning of FACA. National Anti-Hunger Coalition, 557 F.Supp. at 528. If the purpose of this Committee was to study the effects of a particular type of regulation of microbiological criteria on the public, then the result might be different.

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[7] It would be impossible to include among the members of the Committee every type of consumer group which may be affected by the Committee's work. See NTEU, slip op. at 8-9.

In conclusion, the Court notes that while Congress passed FACA with the goal of creating some controls and standards for governance of the advisory committee process, the statute presents various obstacles to appropriate judicial interpretation. 5 U.S.C. App. I, § 2; See National Anti-Hunger Coalition, 557 F.Supp. at 530. In National Anti-Hunger Coalition, Judge Gesell addressed the problem of judicial interpretation of FACA.

> . . . It [FACA] is obscure, imprecise, and open to interpretations so broad that in the present context at least it would threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine. Not surprisingly, litigants seize on such uncertainties and may try to press statutory claims beyond statutory boundaries. . . Many with considerable merit on their side criticize the involvement of federal courts in matters of this kind although the fault lies primarily with congressional drafting. If more expertise were applied to such enactments to ensure that Congress states with more precision what it intends, the rules of the game would be more sharply drawn and court involvement could be less.

557 F.Supp. at 530. This case illustrates several aspects of the difficulty of applying objective legal rules to the FACA. For example, plaintiffs rely solely on inferences and speculation to taint the composition of the Committee, thus food industry employment is equated with anti-regulatory sentiments and any member who has ever worked as a consultant for industry is also classified in this manner. Notably, plaintiffs have offered no specific evidence that their viewpoints are not adequately represented by the Committee. Like other courts which have addressed similar issues, this Court is concerned that if the speculative and conjectural injuries offered by the plaintiffs in this case were judicially cognizable, the Court would then be called upon to supervise the membership of federal advisory committees on a continual basis, thereby altering the composition of these committees on a subjective determination of fair balance. NTEU, slip op at 7 n.5, quoting, Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). Accordingly, plaintiffs' motion will be denied and the case dismissed.

An appropriate Order has been filed.

Dated: OCT 2 4 1988

JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

CENTER FOR AUTO SAFETY
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October 28, 1988

Senator John Glenn, Chairman
Senate Committee on Governmental Affairs
Dirksen Senate Office Building 346
Washington, D.C. 20515

Dear Senator Glenn:

The Center for Auto Safety commends the continuing efforts of the Senate Committee on Governmental Affairs to improve the Federal Advisory Committee Act (FACA). We endorse many features of S. 2721 which we believe will ensure greater procedural fairness, enhance public access to committee records, and provide a better organized statute. Nevertheless, the bill continues to include a number of regressive provisions that will undermine the open government objectives of the FACA. The elements that need to be reconsidered are:

- the definition of "meeting";
- the definition of "subcommittees or subgroups";
- the term "primarily operational";
- conflict of interest disclosures;
- balanced representation of viewpoints;
- the term "collective advice"; and,
- appointment of representatives of interest groups as special government employees.

A foundation for significant improvement of S. 2721 was laid by the last panel to testify at the October 5, 1988, hearing. In their testimony, Mr. Eric Glitzenstein, of Public Citizen; Mr. Brian Murphy, representing the Federal Bar Association (FBA); and Ms. Roberta Fede, President of the Federal Advisory Committee Management Association (FACMA), offered specific ideas that would eliminate several serious flaws currently embodied in the bill.

Definition of "Meeting"

First, all agreed that the bill's definition of the term "meeting" is defective. Reliance upon a majority gathering to constitute a meeting will encourage agency abuse through the use of less-than-majority gatherings that evade application of the Act. Cliques could set agendas, draft positions and determine the substantive outcome of issues without adhering to the FACA since they do not constitute majority "meetings." The definition also excludes from its purview the solicitation of reviews and comments from individual members through separate and selective contacts. Substitution of the language proposed by the FBA would eliminate the danger while not restricting inconsequential contacts. Both FACMA and Public Citizen support this change.

Definition of "Subcommittee or Subgroup"

Next, it was pointed out that the definition of the phrase "subcommittee or subgroup" invites evasion of the statute. The bill's definition allows subcommittees to perform the essential deliberative functions of producing advisory recommendations so long as final recommendations are approved by the full committee.

Moreover, subcommittee participation is not limited to members of the parent committee. Thus, representatives of interest groups may be appointed to "stack the deck" on a subcommittee and may meet privately -- without being subject to the FACA -- to make determinations for acceptance by the full committee. This would make a mockery of the concept of balanced representation and of any official plan to achieve such balance. Public Citizen addressed this issue and has set forth a reasonable solution which has the support of the FBA, and FACMA: "define a subcommittee as any group of members of the full committee which is authorized to act on behalf of the committee and which reports either to the committee itself or directly to federal officials."

"Primarily Operational"

In addition, Public Citizen recommended that the term "primarily operational" be eliminated and that committees, whatever the nature of the majority of their work, comply with the major provisions of the FACA when acting in an advisory capacity. Otherwise, so-called operational functions could be grafted onto committee activities in order to conceal their advisory deliberations and provide a plausible cover for exemption from the Act.

Conflict of Interest Disclosure

With regard to the conflict of interest concerns, we believe that the FBA, FACMA and Public Citizen have mutually consistent positions which, taken together, offer a creative solution to the problem. As their testimony reflects, there is a need for public disclosure of interests that are relevant to the work of the committee, and there is a need for uniform rules that apply to all committee members. This issue can be resolved by adopting uniform conflict of interest rules that are specific to advisory committee members, including public disclosure of an abbreviated description of actual or potential conflicts.

Balanced Representation of Viewpoints

We also agree with Public Citizen that S. 2721 provides for the appearance of balanced representation without requiring actual implementation of a plan to achieve a balance of viewpoints. Congress must clearly enunciate a duty for federal officials to ensure that balance is maintained throughout the existence of the advisory committee. Unless agency personnel have the burden to comply with a congressional mandate for balanced representation, this fundamental due process aspect of the FACA will be unenforceable and, consequently, ignored.

The bill should specifically require, first, the President or an agency to demonstrate affirmative efforts to institute and maintain a balanced representation of views on all committees. As part of the agency's plan for securing balanced membership, the committee personnel should be required to submit direct evidence of their effort filed along with the committee's charter. This document should list should list all individuals and organizations considered and approached for committee service. Second, the bill should require that the annual advisory committee report contain an explanation of how each advisory committee maintained that balance in the previous year.

Other Considerations

We also recommend reconsideration of two other points which were not raised during the October 5, 1988 testimony. First, insertion of the word "collective" dangerously reduces the scope of the statute. Even as a substitute for "consensus," this phrase can easily be interpreted as a limitation on the reach of the statute that needlessly alters the existing law. This qualification on the format of the advice will ensure widespread abuse in the future. Second, we think it inappropriate for representatives of private interests with pre-existing views to be designated as Special Government Employees for service on a committee. Committee members who represent nonfederal organizations or interests should not be provided the semblance of impartiality by federal employee status. Such designations falsely sanitize their relationship to the work of a committee and provide a semblance of propiety which can be used to defeat balanced representation.

In sum, S. 2721, as presently formulated, includes provisions that will permit wholesale violations to occur. At the hearing, Mr. M.R. Longo, counsel to the University of Southern California, presented the Committee with testimony on one current scenario of FACA abuse. Mr. Longo described agency officials who operated unchartered advisory committees and sought only compliant participants. These same federal officials will employ the additional permissible avenues for subterfuge afforded by the provisions enumerated above for the same goals -- to defeat the efficacy of the statute. Any one of the loopholes is a blueprint for evasion of the FACA's requirements and radically weakens the statute. For these reasons, we believe that it is imperative that S. 2721 be substantially revised.

While the Center applauds the successful drafting efforts of the Committee to improve the clarity and the pragmatic functioning of the current statute, we cannot support deterioration of the Act's due process protections. The revisions we support are aimed at maintaining openness in government and public oversight of the operations of government without unduly sacrificing efficiency or private participation. Since these goals can, for the most part, be accomplished within the framework of the testimony presented at the Committee's October 5 hearing on the FACA, we strongly urge the Committee to adopt the changes we have discussed in the previous pages.

Finally, we note that along with the progressive ideas presented at the hearing, a renewed effort to secure an exemption for state and local officials was proffered. Such an exemption was cast in the light of effective planning and implementation of shared programs. However, even in the examples cited, i.e., the Federal-Aid Highway Program and the Clean Air Act, the state and local officials are in the position of regulated parties who seek to lobby for program changes often to avoid or reduce federal requirements. We remain adamantly opposed to this proposal because it will enable these officials and their interest groups to act as an unofficial arm of the federal government. Blurring the barriers between the regulators and the regulated will undermine the integrity of open government mechanisms, particuarly informal rulemaking under the Administrative Procedure Act.

Most sincerely yours,

Henry M Jasny

Henry M. Jasny, Esquire

Gerald A. Donaldson, Ph.D.

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STATEMENT ON FACA BEFORE SENATE GOVERNMENTAL AFFAIRS COMMITTEE

BY **ALEX NAIMON**

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October 5, 1988

Thank you, Mr. Chairman, for your September 9 invitation to submit written testimony on FACA, the Federal Advisory Committee Act. Some who know me will suggest my thanks stem from your placing no limit on the length of my testimony.

I am ALEX NAIMON, an attorney admitted to practice in D.C. and New York in 1951, in the Supreme Court in 1980, and in Maryland in 1987. I retired from Federal service in 1986, which allows me to express my views candidly, more so now than in 1984, when I was a featured speaker on a FACA program at the Federal Bar Association(FBA) annual convention in Baltimore.

My expertise in FACA is largely based on working with peer review-type advisory committees in the Public Health Service(PHS) between 1970 and 1977 as Regulations Officer and Legislative Liaison Officer for a PHS Bureau, then as an attorney in VA's Office of General Counsel between 1977 and 1986 frequently assigned FACA matters, and last but not least as a member of the FBA's Select Committee on FACA for the last five years. The Select Committee experience exposed me both to how FACA was operating across a broad range of executive agencies outside my own, and to the insights and thinking of committee management officers as well as of lawyers. The Select Committee's interdisciplinary approach of combining lawyers with operating officials familiar with the day-to-day issues and the nuts and bolts procedures of their respective agency advisory committees enhanced our insights, giving our efforts a synergistic effect.

There are six aspects of Federal advisory committees(FACs) I'd like to highlight; then I'll offer substantive comments on S. 2721:

1. FACA as part of Participatory Democracy (Open Government)
2. Advantages of Advisory Committees
3. Authority to Establish FACs is Legislative
4. FACs are very cost effective on an overall basis
5. The Problem of Insuring Public Participation &Balanced Membership
6. The Bottom Line--A Tool for Good Government

FACA AS PART OF PARTICIPATORY DEMOCRACY (OPEN GOVERNMENT)

As Senator Glenn noted last December, FACA, along with the Freedom of Information Act, the Privacy Act, and the Sunshine Act are the four pillars of our open Government in the context of the Federal administrative process. FACA is designed to assure that when our Government seeks advice outside the Government and day-to-day Government staffing, the entire process will be open, public and fair. This means that when a Federal advisory committee(FAC) is established, it must meet as a body and discuss the items on its agenda. That agenda must in turn be approved in advance by the Federal official designated for this purpose by the relevant agency head. The agency must also publish timely notice of its proposed meetings in the Federal Register, and these meetings, with few exceptions, must be open to the public. Members of the public have a right to make presentations at the FAC meetings, and to obtain copies of detailed minutes of all FAC meetings. Detailed minutes must be maintained of all FAC meetings, and must include all the options presented as well as the final recommendations made by the Committee as a body. Advisory committees must be comprised of a balanced membership in terms of the points of view represented, and the functions to be performed. Advisoy committees must also be free of undue influence by special interests.

ADVANTAGES OF ADVISORY COMMITTEES

Federal advisory committees have the potential to substantially benefit their respective agencies in terms of expanding their horizons, exposing executive agency officials to new knowledge, increasing the range of potential responses to significant issues within the agency, and becoming apprised of current thought outside the agency in the field of concern to the FAC. Because Federal advisory committees are required to have a balanced membership, and because FACs are generally free of an agency's inbreeding bias, a Federal advisory committee's recommendations can also afford a rational basis for agencies to change or alter policies without casting aspersions on the established policies and those who established them.

THE AUTHORITY TO ESTABLISH FACS IS LEGISLATIVE

Since there is no inherent authority in a Federal Department or agency to establish advisory committees, Congress, as the Federal Government's policy-maker under Article I of the Constitution, should make clear in each case the terms under which an agency can establish or utilize an advisory committee. When drafting or commenting on bills to establish an agency or an independent program as Legislative Liaison Officer for a PHS Bureau, I always sought to include an advisory committee as part of the agency's organizational structure. This practice nevertheless recognized that the establishment of a FAC was for the Congress to authorize or withhold, and on what terms, if indeed my draft bill survived the five approval layers between me and the Congress; each approval layer might also have different ideas than I about the nature and scope of the FACs I proposed. To this extent I disagree with the premise in S. 2721 that every Federal executive agency per se has authority to establish advisory committees. Such automatic statutory authority, if extended to executive agencies without exception would tend both to reduce the amount of Congressional attention given to the FAC, and would encourage executive agencies to go their own way oblivious of potential Congressional concerns.

HOW TO MEASURE FACS' COST EFFECTIVENESS

There has been a tendency, particularly during the current Administration, to be overly concerned about the cost of Federal advisory committees. This concern overlooks the fact that the country derives enormous benefits from many FACS, which greatly outweigh cost considerations. For example, our nation's tremendous progress in medical research has been greatly aided by the NIH system of peer review committees. Because many of the nation's most distinguished scientists have furnished their expert views for very modest compensation, we have been enabled to invest our research dollars very effectively. The advisory committee on Social Security arrived at a generally recognized as beneficial compromise recommendation on how to deal with the social security shortfall of billions of dollars where the political system had failed. This FAC saved the Government billions, but cost the Government only thousands. A few well-known examples among many fine examples of FACs too numerous to mention are the Armed Forces Epidemiological Board, the Administrative Conference, the recent Presidential Aids Commission, the (Kissinger-chaired) Central America Commission, VA's Special Medical Advisory Group, and the Kerner Commission. Compare the annual cost of all Federal advisory commissions, estimated by Senator Glenn at $82 million for 1986 with the projected cost annually of over $2.5 billion for DOD consultant services for management and professional services (see Washington Post, 10/4/88, p. C1).

THE PROBLEM OF ENSURING PUBLIC PARTICIPATION & BALANCED MEMBERSHIP

Agencies have shown a tendency to want the benefits without the burdens of FACA. They want the consensus advice, or the opportunity to publicize a committee's purported recommendations, particularly if the recommendations agree with agency leadership views, or to deflect criticism of the agency on a controversial issue by noting that the matter has been referred to an expert independent FAC. Often, agencies prefer to limit controversy by keeping the interested public out of its business, or by "stacking the deck" in their selection of committee members instead of balancing the interests concerned. FACA was Congress' answer in 1972 to such agency attitudes. The public participation, balanced membership, and other FACA provisions designed to achieve fairness are still hallmarks of good Government. Agencies have evaded FACA requirements by: 1)closing meetings without a proper basis, or 2)otherwise limiting participation by the public, or 3)establishing FACs whose membership does not represent an overall balance of interested expert views (e.g., Meese's Pornography Commission), or 4)one member purporting to speak for the views of a FAC which hasn't yet duly reported its recommendations (Kissinger), or worse 5) allowing a part-time consultant for a FAC to issue unsupported statements purportedly on behalf of the FAC to the media before the FAC has formulated its recommendations (Grace Commission). But the worst type of evasion of FACA requirements in my view is 6) failure of an agency to seek to establish a FAC when in fact the agency or one of its constituent elements is seeking advice from a group of experts it forms for that purpose.

THE BOTTOM LINE--A TOOL FOR GOOD GOVERNMENT

The bottom line is that FACA, when properly implemented, shows a democratic administrative process at work. All areas of the public are invited to present their views and to observe and listen to the FAC members, a group of experts with diverse views. The cross-fertilization and refinement of their views helps the Government address difficult problem areas. The FACA structure includes accountability, since detailed minutes of FACA meetings must be kept, options must be listed and FAC recommendations made; the agency head or President receiving such recommendations is accountable for whatever action is taken, or for his inaction, since there is a public awareness of the committee and its recommendations. But FACA is no guarantor of worthwhile results from FAC recommendations; when not abused or evaded, FACA assures merely that the administrative process is rational, open, and fair. That in itself is a very substantial achievement. There are useful committees and not so useful committees. It is hard to predict in advance a FAC's success or failure. My own surmise is that it largely depends on 1)whether the agency establishing the FAC trusts the advisory committee with disclosure of the essential issues facing the agency, and with the essential information needed to deal with such issues, and 2)the quality and balance of the committee membership selected.

SUBSTANTIVE COMMENTS ON S. 2721

I offer the following substantive comments:

1) Congressional authority over Federal advisory committees should be recognized, and there should be increased Congressional scrutiny and oversight of FACs, since Congress under Article I of the U.S. Constitution is the nation's policy-maker. There is no inherent authority for a Federal agency to establish advisory committees, notwithstanding the salutary effects of most such committees. The suggestion here is that proposed Sec. 4(a)(2) be deleted, and that Sec. 6 of S. 2721 be amended.

2.

2. There is no need for GSA to have a continuing role (now essentially one of form rather than substance) in the administration of FACA. Congressional policy cognizance over FACA was substantially diminished by GSA's assumption in 1977 (pursuant to Executive Order under the Reorganization Act) of most of the functions given OMB by the Congress in enacting FACA in 1972. In the more than 10 years since President Carter transferred most ofOMB's functions under FACA to GSA, it is fair to say in general that GSA had the formal responsibility for carrying out these functions, but OMB continued to exercise the authority for decision-making under FACA behind the scenes. GSA, unlike OMB, never had, and now with its augmented five member staff still doesen't have, the kinds of multiple Government-wide expertise needed to meaningfully implement FACA and oversee the multiplicity of advisory committees the Federal Government now has, often working on the boundaries of knowledge. Besides, with over 15 years of experience by the executive agencies with FACA, the agencies have developed their own expertise in FACA, and have no need to consult GSA as to the wisdom of establishing or discontinuing a FAC. Even were the five member GSA professional staff quintupled, what possible resource within GSA would equip GSA with sufficient insight into an agency's operations which would enable it to determine whether establishing (or disestablishing) a FAC was indicated. It is no secret that after most OMB responsibilities were transferred to GSA for implementing FACA, GSA nevertheless continued to refer decisions on establishing FACs to OMB on an informal basis, certainly in significant or controversial cases. And this is based not only on the historical fact that OMB had been exercising control over FACA issues before the transfer, but also on the fact that OMB through its budget examiners is the only Executive Branch agency which might have the necessary expertise Government-wide to evaluate the wisdom of establishing another agency's FACs; more important even than the above considerations is the crucial fact that FACs like all other Executive Branch programs must be funded through the budget process administered by OMB. Even though Sec. 11(f) of S. 2721 substitutes GSA for the original FACA designee in Sec. 7(e) of P.L. 92-463, i.e., OMB, as the agency to make budget recommendations as to the amounts needed for Federal advisory committees, these figures would then (as now) still be scrutinized by OMB, and be subject to OMB's approval and therefore control. GSA's lack of Government-wide expertise would again be evident. It is noteworthy that even after the transfer of most of

its FACA functions to GSA in 1977, OMB still retains overall control of FACs to be established and their scope, yet OMB is not even mentioned in the text of S. 2721; thus OMB has the authority to control FACA implementation but not the responsibility, surely a result inconsistent with public administration principles. Senator Levin's description in the August 10, 1988 Congressional Record (p. 11455) of the committee management practices of DOD's Strategic Defense Initiative Organization illustrates the faulty reasoning underlying GSA's monitorship of FACA. Senator Levin stated,"SDIO's record of non-compliance with FACA was simply disgraceful. We found at least five SDIO advisory committees that had never been chartered as required by FACA." Noone can imagine GSA putting DOD through the wringer for violating the provisions of FACA. Further, GSA's role under FACA is reactive, limited to reacting to agency proposals to establish or disestablish FACs; it does not now, and hasn't the capability in the future, to effectively inspect or audit compliance by agencies with the provisions of FACA(notwithstanding proposed Sec. 11(b)(1)(D) of S. 2721). Only the OMB budget process, through which all proposed Executive Branch funding must pass, including funding for the five presumably illegal SDIO advisory committees, or an internal DOD inspection process are in a position within the Executive Branch to call DOD to account in a meaningful way. GAO, of course, for the Legislative Branch, could also call DOD to account, which is further reason for Congress to maintain closer, meaningful control over implementation of FACA. Accordingly, enacting provisions obligating GSA rather than OMB to audit compliance with FACA chartering provisions lets OMB off the hook it has for assuring such compliance, and will in all likelihood result in more disregard of FACA chartering provisions by DOD and other Federal agencies in the future. In evaluating this proposed deletion of GSA from its role in FACA implementation, one cannot disregard the sad history of GSA's stewardship, particularly between 1981 and 1987, the year it finally prescribed final regulations to supersede questionable, and at times illegal and indefensible, interim regulations. Some of the details supporting this critical evaluation are set forth both in my July 25, 1983 letter to Paul Dembling, President, FBA, subject: Additional Concurring Comments of Alex Naimon, and in the Enclosure to the Dec. 22, 1983 letter from VA General Counsel Murphy to Assistant Attorney General Olson (Enclosures). Essentially a "no man's land" existed insofar as providing authoritative guidance to executive agencies in dealing with major portions of FACA for some seven years of this Administration, e.g., compensation of FAC members. Several agencies considered the GSA guidance as invalid, several considered the GSA guidance inapplicable, several followed the guidance, and the Department of Justice refused to rule on the validity of the GSA guidance. A more rational approach to implementing FACA appears to have been restored in GSA while under the aegis of Asst. Administrator Weiss. But that is no guarantee that matters won't return in the future (after the election) to their former state in 1983, for example, when GSA insisted that GSA had a right to disapprove the establishment of FACs merely because FACA requires agencies seeking to establish FACs to consult with GSA (originally OMB, when enacted in P.L. 92-463). Accordingly I would delete all references in FACA to GSA, if Congress wants FACA to reflect fair and open Government in the administrative process as originally intended, rather than be subject to the whims of OMB and elements of DOD, and quite possibly others.

3. The original limitation in Section 9(b) of FACA that Federal advisory committees be utilized solely for advisory functions (unless otherwise specifically provided by statute or Presidential directive) should be retained. Otherwise it is too easy for an executive agency, or an element of an executive agency, to avoid the application of FACA's open Government principles to an advisory group simply by adding sufficient operational functions so as to make it exempt under proposed Section 4(c) of S. 2721, or even more simply, by declaring the advisory committee is not primarily advisory in nature. I would leave original Section 9(b) of P.L. 92-463 intact rather than substitute proposed Section 4(c) for it.

4. The definition of "subcommittee or subgroup" (p. 4, l. 23) poses the danger of exempting virtually all subcommittees from the application of FACA, i.e., all subcommittees which report only to the full Federal advisory committee, a common occurrence, would be exempt from FACA's open Government provisions if such subcommittee does not report directly to the agency head. This proposed exemption is overly broad and should be deleted.

5. Exception is taken to the provisions of S. 2721 (Sections 5(b)(4) and 7(a)(7)), which contemplate that advisory committee members can represent the views of nongovernmental organizations or groups as an alternative to the tried and true method of appointing members as special Government employees; if appointed as contract consultants, they nevertheless should be subject to Government release of information rules and other rules to which special Government employees are subject. All individuals representing the views of non-Governmental organizations should have an opportunity to present the views of such organization to a FAC, but not as members. If they are both members of a Federal advisory committee, and thus to some extent associated with the Government and its obligation to be fair and objective while at the same time being present in a capacity as a representative of a non-Governmental organization, such dual capacities reflect a (prohibited) conflict of interest, as no man can serve two masters. To permit such dual representation would also appear to call for appointing at least one representative of every non-Governmental organization having a significant interest in the matter under consideration by the FAC, since otherwise, those non-Governmental organizations not included on the committee could quite properly claim they had been discriminated against. The tried and true method of appointing persons with experience and ties to non-governmental organizations as part-time temporary special government employees, who are obligated to try to put aside their ordinary ties to their regular employer temporarily, while bringing to bear their experience on behalf of the Government is to my mind much the preferred method. In my lexicon, conflicts of interest are illegal and therefore prohibited, by definition.--If the concept of appointing FAC members to represent the views of non-Governmental organizations is nevertheless kept by the Governmental Affairs Committee, then it is urged that its application at least be limited to FACs specifically established

by Congressional direction or by the President; this suggested limited scope of application is based on the idea that specifically directed Congressional and Presidential FACs are both significant and national in scope, and may transcend the usual FAC context, as, for example, was true in the case of the Social Security Commission, and perhaps for the National Economic Commission as well.

6. Somewhat related to the conflicts of interest issue is the provision (Sec. 10(e)(5)) calling for the agency advisory committee management officer to oversee and provide counseling on ethics issues and financial disclosure obligations. Such provision is quite unrealistic. These matters are typically assigned to the agency Ethics Officer, almost universally General Counsels or Assistant General Counsels. Agency advisory committee management officers are too far down the agency's hierarchy to oversee and provide sound, objective counseling on ethics issues and financial disclosure obligations, let alone exercise control and supervision over FAC operations as proposed. On the other hand, agency advisory committee management officers could usefully serve as the liaison between the requestor for advice and the agency Ethics Officer.

7. There is considerable question as to the meaning of "meeting" in FACA, and so the attempt in the Definitions Section to define "meeting" is praiseworthy. Yet the proposed definition (p. 5, l. 9) solves little and creates new issues. Thus the FACA open governmentprovisions can be evaded simply by planning to have meetings of less than the majority of a FAC, at which substantive committee business is discussed. Also, the reference on the bottom line of the definition to " ...purposes described in paragraph (3)" is quite unclear as to what purposes are intended. Then too, the definition uses the word "between", but does not make clear between what and what. Justice Potter Stewart's dictum on pornography, "I know it when I see it!" might usefully applyalso to the definition of "meeting". Using this rationale, we would leave it to agency officials and their General Counsels initially to interpret what is a meeting within the meaning of Sec. 10 of FACA; then, members of the public unsatisfied with this initial interpretation could take the agency to court and litigate the "meeting" issue. So I recommend leaving Sec. 10 of FACA alone and omitting the proposed definition of "meeting."

8. The formulation in Sec. 7(d) of FACA giving OMB, after study and consultation with the Civil Service Commission (now OPM), authority to prescribe uniform fair pay guidelines for members, staffs, and consultants of FACs is much preferred over that of Sec. 11(d) of S. 2721, which gives GSA the entire responsibility to set fair pay guidelines without the requirement to consult OPM, the agency with expertise in the area of pay. It is disappointing and surprising that the Governmental Affairs Committee would entrust fair pay guidelines to the agency that for several years justified the position that no pay is fair pay(in certain circumstances).

9. There are several "timely notice" requirements scattered throughout S. 2721, as there were in the original FACA, as, for example, in Sec. 12(a)(2) on p. 23, l. 10. These notices are an integral part of the public participation provisions of FACA, particularly in the case of Federal Register notices of planned meetings of FACs to alert interested persons and groups about such meetings. The sad fact is that timely notice isaas much honored in the breach as in the observanceand sometimes with no stated reason. It is therefore suggested that the bill be amended to call for such notices to be published in the Federal Register 30 days (or at least 20 days) before the scheduled meeting, and that if the submitting agency cannot meet the notice requirement, the additional requirement be imposed of requiring that the late notice specify why the notice is late, and a copy of such late notice sent to GAO for filing. It is noted that the phrase "timely notice" has taken on a certain ambiguity since the Iran-Contra hearings.

10. The phrases "presidential advisory committee" and "independent Presidential advisory committee" both appear in the bill, but the distinction between them is not explained (see p. 23, l. 19); these terms should be defined or at least distinguished.

11. The very sound principle enunciated in proposed Sec. 12(b) of S. 2721 permitting the advisory committee as a group to control the release of its recommendations should be broadened to apply not only to the Federal advisory committee as such, but to its members and its staff; nor should the policy of Sec. 12(b) be limited to reports to Federal officials, but rather the limitation should apply so as to forbid releases to anyone not associated with the FAC, e.g., the media.

12. As a member of the FBA's Select Committee on FACA, I dissent from the position contained in the Oct. 5 paper(admittedly a position offered as a personal one) suggesting that groups composed of a combination of Federal, State, and or local government officers or employees meeting to discuss shared programs should be exempted from the

application of FACA. Examples given for application of such exemption are the Federal Highway Program, the air pollution control program under the Clean Air Act, and I might add, Medicaid. These grant-in-aid programs are the very type programs in which public participation is needed to arrive at fair, democratic results, notwithstanding agency program managers would prefer to handle these issues behind closed doors.

13. As to the 1980 ACUS suggestion referred to on the last page of the FBA Oct. 5 paper that one-time meetings should be considered for exemption from FACA, this would in my view open the door to wholesale evasion of FACA. In these days of word processors and computers, it would not appear difficult to conduct such one-time meeting outside FACA cognizance, and then, perhaps one year later, initiate a similar committee, possibly with a different name or with slightly different membership, or a slightly different stated purpose all designed to avoid FACA's application, with consequent loss of public participation in both meetings. It is noted that some FACs meet just once a year for just a few days. Also noted is that this proposed exemption of one-time meetings has been proposed to the FBA Select Committee several times over the last five years, and each time it has been rejected.

Enclosed also are some sample opinions and comments on FACA matters, which offer some insights into how FACA issues arise within an executive agency.

Also enclosed is some biographical material.

File Copy —

ADDITIONAL CONCURRING COMMENTS OF ALEX NAIMON

July 25, 1983

Paul Dembling, Esq.
President, FBA

Paul

Dear Mr. Dembling:

Although I generally concur with the Select Committee on Advisory Committees' proposed letter to GSA, I have the following additional thoughts which I am taking the liberty of communicating to you by way of a separate concurring comment. Though I raised most of these points at meetings of either the drafting subcommittee or the full committee, or both, time has not permitted discussion and consensus to be arrived at concerning these additional ideas:

1. I believe it would be preferable for any FBA letter to GSA commenting on GSA's proposed regulations appearing in the April 28, 1983 Federal Register to be addressed to the GSA Administrator, Mr. Gerald Carmen, rather than to the Special Assistant to the Archivist, GSA, Mr. Ron Martinson, who is a member of our very Select Committee; in addition, it would be preferable if you as President would sign the transmittal to GSA from FBA because the Select Committee is making substantive comments and, at least by implication, is recomending significant changes in the GSA's April 28 proposals.

2. Any FBA comment on the April 28 GSA proposed regulations should recommend that final publication of these regulations be delayed at least until OMB and the Department of Justice have submitted formal comments on the substance and the legal sufficiency of the proposed regulations, inasmuch as the

Federal Advisory Committee Act (FACA) was originally implemented by the issuance of OMB Circular A-63 by OMB and the Department of Justice jointly. Notwithstanding the reorganization of FACA functions by President Carter in 1977 transferring most OMB functions under FACA to GSA (as to which neither the Senate nor the House exercised a legislative veto), OMB continued to exercise management control over FACA issues, in the process accumulating ten years of experience. Under these circumstances it makes little sense for GSA, the purported successor, to make significant changes in the implementation of FACA without the benefit of OMB's public comments and a discussion of GSA's reaction to such comments in the Federal Register, which would enable the interested public to understand the nature of GSA's proposals.

3. It is a long-established principle of good management that authority and responsibility should go together. Several members of the Select Committee understand, nevertheless, that GSA's intention in administering its proposed regulations is to continue to be guided by OMB, so that OMB would have the authority and GSA the responsibility. Added to this intention is the fact that GSA proposals purport to authorize GSA not only to be consulted by agency heads seeking to establish advisory committees as called for in section 9(b) of FACA, but also, beyond statutory authority, to concur, non-concur, or "pocket veto" such agency proposals by withholding such concurrence/non-concurrence. Under these circumstances the Governmental Affairs Committees of Congress should review such apparent "usurpation"

of legislative functions by GSA, particularly if GSA may be merely a figurehead agency in this context. Accordingly, the FBA should bring this issue (and others raised by GSA proposals) to the attention of the appropriate committees of the Congress promptly, in any event before the GSA April 28 proposals are published in final form.

4. In issuing Executive Order 12291 shortly after taking office, President Reagan released a statement assuring the public that significant regulations would not be issued until his high-level committee on Regulatory Reform, chaired by the Vice-President, had reviewed such proposed regulations in detail. GSA's April 28 proposals certainly meet any reasonable definition of a significant regulation, having been issued three times in different forms already; these proposals form the basic ground rules under which the country's least tractable issues, involving trillions of dollars (e.g., social security, Scowcroft (missiles-disarmament), Central America (war-peace), civil disorders (Kerner), Agent Orange), are increasingly being dealt with by advisory committees. Already many are criticizing the President and Congress for encouraging the government to be run by advisory committees. FACA is designed minimally to ensure public participation and balanced membership in the making of government policy when the Executive Branch turns to non-Governmental entities to assist in formulating such policies, and so is a vital cog in assuring the perpetuation of democratic values. Although the specific language of E.O. 12291 can be read narrowly so as to

exclude a review of the GSA April 28 proposals by characterizing them as non-major, it would be a far better interpretation of the President's intention in issuing E.O. 12291 as applying to the April 28 proposals of GSA. This view should be communicated by FBA to both GSA and the Committee on Regulatory Reform.

5. Various agencies and Departments have commented that since there were many significant changes between GSA's previous publication of its proposed FACA implementation and its later April 28, 1983 issuance, the latter should have been published as a proposed regulation rather than as an interim regulation. While at first blush this distinction might appear to be a mere technicality, close scrutiny of the transaction yields a different conclusion. Publication of the April 28 proposals may subject such proposals to close and formal OMB review under OMB's Paperwork Act implementation issued March 31, 1983, whereas GSA's narrow construction of the latter document has led GSA to consider the OMB March 31, 1983 issuance inapplicable to interim regulations. Accordingly, the FBA should seek to arrange for the Office of Legal Counsel, Department of Justice, to render an opinion as to whether GSA had authority to issue its April 28 proposals in the form of interim regulations purporting to be effective immediately.

6. There are also a series of what appear to be technical errors included in the April 28 GSA proposals which should be brought to GSA's attention in writing. Thus, the definition of "Presidential advisory committee" in Sec. 101-6.1003 is defined

only in the past tense; the terms "Independent Presidential advisory committee" and "Presidential advisory committee" are not sufficiently distinguished from each other; the duties of a Chairperson of an Independent Presidential advisory committee are defined, while the duties of a Chairperson of a Presidential advisory committee are not (likely an unintended distinction); the word "utilized," a crucial word in the statutory definition of "advisory committee," is unsatisfactorily defined by any standard; references to the Government in the Sunshine Act in Sec. 101-6.1023 are not quite correct; and the proposals do not appear to carry forward FACA's requirement for a public report to be made at least annually about an agency's closed meetings. While these may or may not be major defects in the April 28 proposals, FBA should communicate its views on these apparent deficiencies to GSA as soon as possible.

Thank you for the opportunity to serve you and the FBA on this Select Committee.

Cordially,

Alex Naimon

ALEX NAIMON, Member
FBA Select Committee on
Advisory Committees

AN/dn

ALEX NAIMON
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November 23, 1988

Dear Senators Glenn and Levin:

ABOVE ALL, DO NO HARM!

That's a heck of a note on which to start a letter to two of my favorite Senators, but some things must be said before it is too late.

As a member of the Federal Bar Association's Select Committee on FACA, I attended the Committee's Oct. 24 meeting held to discuss the additional questions you put to our Committee in your joint October 14 letter. That these additional questions made no mention of my testimony (or of the quite similar November 12, 1987 statement of the Center for Auto Safety) is attributable I trust to the fact that your respective offices only received my testimony a day before you sent your October 14 letter(but well within the period prescribed for receiving testimony relating to your October 5 hearing on FACA). At the outset of our Committee's Oct. 24 meeting, I urged the Committee to address my testimony, dated Oct. 5 (but delivered Oct. 13) as well as your additional questions; I also urge you both, and the Senate in general, to address rather than disregard my written statement.

The underlying rationale for my request was that my written statement, dated Oct. 5, appeared to contain the most trenchant criticisms of the existing FACA process of any statement the Governmental Affairs Committee received, certainly more trenchant than any heard at the October 5 hearing, and so deserved serious consideration. It now appears from the Nov. 12, 1987 statement by the Center for Auto Safety that the Center holds very similar views to mine on the crucial issues of preventing evasions of FACA by agencies that disregard charter requirements and the requirement of balanced membership; in fact the Center's statement documents evasions of FACA open Government requirements by failure to charter committees properly subject to FACA in the transportation area.

Senators Glenn and Levin

As the core improvement in the FACA administrative process, I recommend deleting GSA from the FACA process:

1) as being unnecessary in light of the 15 year capabilities developed by the executive agencies;

2) as lacking the necessary expertise to oversee agencies dealing with some of the nation's most sensitive issues;

3) as lacking the clout to assure compliance with the spirit of open Government which lies at the heart of FACA; and

4)as serving as OMB's foil, with FACA responsibility in name only, while OMB(not mentioned in the text of S. 2721) continues to make the real decisions on FACA issues albeit avoiding accountability for such decisions.

While you (Senator Glenn) asked the key question of GAO at the October 5 hearing, to compare OMB's performance in implementing FACA until 1977, with GSA's performance after Pres. Carter transferred most of OMB's FACA responsibilities to GSA, the GAO response was brief, and in my view somewhat superficial, possibly because the GAO witness wasn't intimately familiar with FACA matters 12-15 years ago. Unfortunately, this issue was not further pursued, even though GAO may be the only Federal instrumentality in a position to objectively evaluate the specifics of GSA's negative or positive contribution to the administrative process under FACA. Consider that OMB in its role as the President's management agent for his legislative program, had previously circulated its (draft) views to the interested executive agencies, indicating it did not want to officially resume the FACA responsibilities it had transferred to GSA in 1977. This effectively prevents the Congress from obtaining the true views of all Executive Branch agencies, and squarely raises the question whether overall policy on open Government in the administrative process under FACA should be made by Congress, as contemplated by Article I of the Constitution, or by OMB for the Executive Branch. If the mere fact that OMB states it doesen't want to have the formal responsibility for implementing FACA (while retaining behind-the-scenes control over it) is sufficient to dissuade Congress from examining into the question of whether

Senators Glenn and Levin-

the executive agencies themselves, or OMB, rather than GSA, should be Congress' agent to implement Congress' FACA policy, then Congress will have ceded some of its authority under the Constitution to OMB, with consequent division between responsibility (in GSA) and authority (in OMB), as outlined in my statement, dated Oct. 5,'88; less open government in the administrative process would be the necessary result.

While many observers view FACA as the least important of the four statutory bulwarks of open government in the administrative process, such view doesen't take account of the fact that many if not most of the nation's most important and most intractable, and most sensitive issues are being referred to Federal advisory committees, in many cases after both the Executive and Legislative Branches have opted not to deal directly with such issues. On November 2, C SPAN, with its millions of watchers carried the two hour meeting on November 1 of a Congressionally mandated, Presidentially approved Federal Advisory committee, the National Economic Commission, which was clearly an example of how valuable open government processes can be. The dialogue among some of the countrys' most distinguished citizens, particularly the colloquies between Caspar Weinberger and Lane Kirkland, contained more substance on the question of how to deal with the budget deficit, and how, if at all, to reduce Defense expenditures, and how to pay for them than can be gleaned from all the statements by either party's Presidential campaign to date. I believe FACA is increasingly worth your joint attention as well as Congress' as a whole, with a view to retaining Congressional rather than behind-the-scenes OMB control over FACA policy matters. But, if you won't reconsider the wisdom of provisions in S. 2721 giving statutory status to GSA as Congress' agent to implementFACA, then in my opinion, your bill will have done more harm than good (unless you find some way of precluding agencies from evading FACA requirements, particularly its charter requirement and its balanced membership requirement). The details of my position are set forth in my written testimony, dated Oct. 5. Set forth below are my separate comments as a member of the FBA's Select Committee on the questions you put in your joint Oct. 14 letter to our Committee:

Senators Glenn and Levin

1. The "chilling effect" results only when potential advisory committee members are seeking information from executive agency personnel who are carrying out instructions to evade the application of FACA. This is not only my inference, but when I suggested it to Mr. Longo as the basis for the "chilling effect" he described in informal conversation on October 5 immediately following his testimony, he agreed. It is the obvious inference to be drawn when executive agency personnel are reluctant to discuss the details of invitations they extend to potential advisory committee members; when an agency is embarked on an illegal course of evading the law, i.e., failing to charter a Federal advisory committee, there are no guideposts along the way indicating how such evasion should be carried out or covered up. In my experience in several Executive Branch agencies, personnel assigned to committee management functions are uniformly open and anxious to assist and encourage potential Federal advisory committee members so as to encourage their participation and facilitate the committee's work, and thereby the agency's mission. But when agency officials, as in the SDI Office, seek the participation of advisory committee members on committees they don't intend to charter as FACs, though FACA requires that they should, the committee management personnel are obviously in an untenable situation, since the instructions not to charter the committee contradict the specific provisions of FACA. To avoid the chilling effect, there must be compliance with FACA's chartering provisions so as to achieve open government in the administrative process. My written testimony, dated Oct. 5,88 addresses in detail how to achieve such compliance, principally by reasserting Congressional control and oversight over the FACA process and deleting GSA from such process.

2. The suggested amendment would likely do no harm, although it should be noted that agencies already have the authority to send out such Letters. The flaw in the suggestion is that its scope of application is limited to those committees which the agency recognizes as FACs subject to FACA, whereas, as pointed out in 1. above, the chilling effect emanates from circumstances where the agency is illegally seeking to evade FACA's application, in which case the agency would not send out the suggested letter.

3. It is suggested that FAC members be required to file a limited conflict of interest form, to be made available to the public, but limited to listing the member's affiliations, organizational and financial, and with no requirement for the numbers involved to be supplied.

There is no conflict or internal inconsistency between achieving open government and a workable, enforceable FACA. In fact if a workable, enforceable FACA is not achieved, then open government in the administrative process will not be achieved. My detailed suggestions for achieving open government are included in my written testimony, dated Oct. 5, 1988.

4.) The source of the question on Brian Murphy's personal suggestion (as distinct from the Select Committee's), to exempt panels composed of Federal, State, and Local officials from FACA requirements , since it does not appear above your joint signatures, is unclear. In any event, any such exemption for such important Federal advisory committees would do violence to the open government principles of FACA, and would deprive the public of its opportunity to participate in programs of vital importance to the community, such as air pollution control under the Clean Air Act, the Federal Highway program, Medicaid, etc. See also item 12 on p. 11 of my written testimony, dated Oct. 5, 1988.

I trust that both of you, as well as other interested Senators, will take note of these separate comments and of my invited testimony, dated Oct. 5, 1988 as part of your oversight of FACA and before seeking to amend it, whether in S. 2721 or otherwise.

Cordially,

Alex Naimon

ALEX NAIMON
Member, FBA Select Comm. on FACA

United States General Accounting Office

GAO

Report to the Chairman, Committee on
Governmental Affairs, United States Senate

October 1988

FEDERAL ADVISORY COMMITTEE ACT

General Services Administration's Management of Advisory Committee Activities

Printed copies of this document will be available shortly.

GAO Form 171 (12/87)

GAO
United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-231312

October 5, 1988

The Honorable John Glenn
Chairman, Committee on
  Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to the Committee's request that we review the manner in which the General Services Administration (GSA) is administering the Federal Advisory Committee Act (FACA). We have made a series of reviews in the past year of matters related to the act. We testified before your Committee on December 3, 1987, on the President's Commission on AIDS[1] and on April 19, 1988, on the Department of Defense's compliance with the act.[2]

RESULTS IN BRIEF

GSA has focused its attention on preparing the President's annual reports to Congress and issuing guidance to departments and agencies. GSA has not carried out its other responsibilities under FACA. It has not ensured that advisory committees were properly established, that each committee was reviewed annually, and that reports on Presidential advisory committees' recommendations were prepared for Congress. GSA officials attributed the shortcomings to limited staff capability and management inattention, and they said they were developing the capacity to carry out these FACA functions.

APPROACH

The objective of our review was to evaluate the extent to which GSA has carried out its responsibilities under FACA. While the President, the various agencies using advisory committees, Congress, and GSA all have responsibilities under the act, the scope of our review was limited to GSA. We reviewed FACA's provisions, the act's legislative history, and GSA's regulations on advisory committees and compared the act's requirements to actions GSA has taken.

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[1] Statement of Rosslyn S. Kleeman, Senior Associate Director, on "The President's Commission on AIDS" (GAO/T-GGD-88-6, Dec. 3, 1987).

[2] Statement of Rosslyn S. Kleeman, Senior Associate Director, on "DOD Compliance With the Federal Advisory Committee Act" (GAO/T-GGD-88-31, Apr. 19, 1988.)

In determining what GSA has done to fulfill its responsibilities, we reviewed GSA's actions on 114 proposed charters and justification letters submitted by agency heads to GSA during fiscal year 1987 and early fiscal year 1988. Agency heads submit proposed charters and justification letters to GSA when they want to establish, reestablish, or renew an advisory committee. We reviewed annual reports submitted to GSA by agencies on advisory committee operations and analyzed the data contained in the reports. We also analyzed the information contained in annual reports submitted to Congress by GSA.

We interviewed Department of the Interior and Health and Human Services officials to obtain an understanding of the information agencies include in their reports to GSA. In addition, we interviewed GSA officials responsible for oversight of advisory committees to determine how they perceive their roles and responsibilities. Our work was done between May and September 1988 in accordance with generally accepted government auditing standards.

BACKGROUND

Congress passed FACA in 1972, acting on a concern that federal advisory committees were proliferating without adequate review, oversight, or accountability. The legislative history of FACA indicates that Congress intended that the number of advisory committees be kept to the minimum necessary and that they operate under uniform standards and procedures in the full view of Congress and the public.

While Congress recognized the value of advisory committees to public policymaking, it included in FACA measures intended to ensure that (1) valid needs exist for establishing and continuing advisory committees, (2) the committees are properly managed and their proceedings are as open as possible to the public, and (3) Congress is kept informed of their activities. The act directed the President, the Director of the Office of Management and Budget (OMB), and agency heads to control the number, operations, and costs of advisory committees.

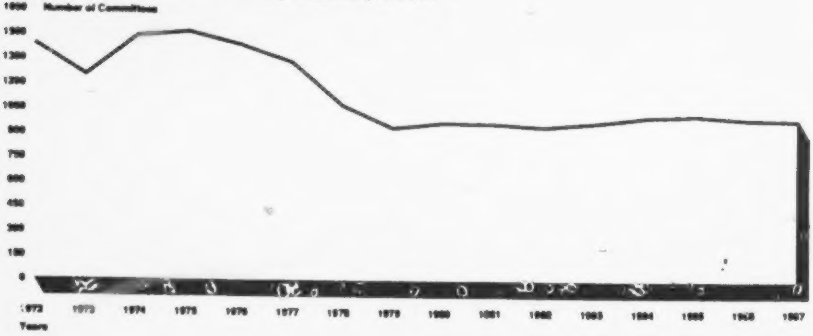
To help accomplish these objectives, FACA established a Committee Management Secretariat in OMB and made it responsible for all matters relating to advisory committee administration.

In 1977, the President transferred advisory committee functions from OMB to GSA. The President also delegated to GSA all the functions vested in the President by FACA, except that the annual report to Congress required by section 6(c) of the act was to be prepared by GSA for the President's consideration and transmittal to Congress. The Secretariat is under GSA's Associate Administrator for Administration. As of September 1988, the Secretariat had five full-time staff, and its budget was $220,000 for fiscal year 1988.

The act requires that each agency head designate an Advisory Committee Management Officer to help manage the committees and that a designated federal official chair or attend each committee meeting.

GSA reported that 992 advisory committees, consisting of 19,837 members, were subject to FACA during fiscal year 1987. Of the 992 committees, 603 were directed or authorized to be created by statute; 22 were created by the President; and 367 were created by agency heads. According to GSA, the government's cost to establish and maintain the advisory committees was about $79 million in fiscal year 1987. The number of advisory committees has varied from approximately 1,400 in 1972, when FACA was enacted, to a high of 1,519 in 1975 and a low of 947 in 1982. The number has since remained relatively constant, as shown in figure 1.

Figure 1.~ Total Number of Federal Advisory Committees, 1972-1987



Note: Includes advisory committees created by statute, Presidential order, and agency directive
Data reported by departments and agencies creating, using, or supporting advisory committees and unverified by GAO

Eighteen departments and agencies, which each established, used, or supported 10 or more advisory committees during fiscal year 1987, together accounted for over 90 percent of the 992 committees in existence that year. These departments and agencies are shown in the appendix.

The proposed Federal Advisory Committee Act Amendments of 1988 (S. 2721), introduced August 10, 1988, would amend various FACA provisions but would continue GSA's responsibilities.

GSA CONSULTATION ON PROPOSED ADVISORY COMMITTEES

Federal advisory committees may be created under FACA by statute, the President, or an agency head. FACA requires that agency heads consult with GSA before they establish advisory committees.[3] GSA believes that this consultation process is the Committee Management Secretariat's most highly visible role, and therefore it should be a meaningful, rather than a pro forma, activity. However, GSA does not have the authority under FACA to stop the formation of an advisory committee. As provided in GSA's regulations, its consultation role is limited to reviewing agencies' proposals to establish advisory committees and determining whether FACA requirements are met. GSA provides its views to agencies, but notwithstanding GSA's views, an agency can establish a committee by filing a charter with the committees of the Senate and the House of Representatives having legislative jurisdiction over the agency, the Library of Congress, and the Secretariat.

GSA requires agencies to submit a proposed charter and justification letter before they establish a committee. The charter and justification letter must contain specific information, such as the committee's objectives and scope, as prescribed in FACA and in GSA's regulations. The regulations say that if possible, GSA will review each such proposal and notify the agency of its views within 15 days.

We reviewed 114 proposed charters and justification letters submitted to GSA by agency heads between October 1, 1986, and

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[3] The Committee Management Secretariat reviews all charters prior to filing for advisory committees established by agencies. In accordance with section 9(c) of the act and GSA's regulations, GSA receives copies of all charters at the time of filing.

May 16, 1988, the date we began our work at GSA. We found that GSA had completed its reviews within 15 or 16 days for 104 of the 114 proposals; the other 10 required 17 to 33 days. GSA concurred in the agencies' proposals to establish all 114 committees.

Of the 114 charters and justification letters we reviewed, 52 were missing 71 items that FACA or GSA regulations required and that GSA said it needs to determine FACA compliance and for other consultation purposes. The most frequently missing item of information in the charters was the identification of the agency responsible for providing the necessary support for a proposed committee. This was missing from 30 charters. Other FACA-required information was missing from 12 charters as follows:

-- Seven did not show the estimated annual operating costs in dollars and staff years.

-- Three did not show the estimated number and frequency of committee meetings.

-- One did not contain a description of the committee's duties.

-- One did not show the agency or official to whom the committee would report.

In addition to the deficient charters, in 29 instances information required by GSA's regulations was missing from justification letters as follows:

-- Fifteen did not include a description of the agency's plan to attain balanced membership in terms of points of view represented and the functions performed.

-- Nine did not explain why the committee's functions could not be done by the agency, another existing advisory committee of the agency, or other means such as a public hearing.

-- Five did not explain why the committee was essential to agency business and in the public interest.

The Secretariat Director agreed that charters and justification letters were sometimes missing required information. He said that he plans to prescribe standard documentation for use in proposing and reviewing the establishment of advisory committees to help ensure that all required information is furnished.

ANNUAL COMPREHENSIVE REVIEWS

FACA requires GSA to make an annual comprehensive review of each advisory committee to determine if it is carrying out its purpose, whether its responsibilities should be revised, and whether it should be abolished or merged with another committee. After completing the reviews, GSA is required to recommend to the President, and to either the agency head or Congress, any actions GSA deems should be taken.

GSA requires agencies to review at least annually the need to continue each existing advisory committee. Among other information, agencies are to report to GSA:

-- how the committee accomplishes its objectives, and the effect of committee advice on the sponsoring agency's operations;

-- how the agency has achieved balanced membership on the committee;

-- how frequently the committee met during the previous fiscal year;

-- why the functions of the committee cannot be achieved through other measures available to the sponsoring organization; and

-- why committee meetings were closed, if applicable.

GSA told us that it does not verify the data it receives from agencies and that it accepts the agencies' data as is, including their recommendations as to whether a committee should be continued, merged, or terminated. GSA, in turn, submits the agencies' reports directly to Congress as appendices to the President's annual report required by FACA and does not indicate that the data used in the report were not verified.

We reviewed the reports that agencies submitted to GSA on each advisory committee in operation during fiscal year 1987. We noted that a number of committees had held no meetings during the previous 1 or 2 years. Some of these committees incurred costs even though they had not met. Most of the costs were for federal staff doing such tasks as answering correspondence and contacting committee members.

Of the 992 advisory committees in existence during fiscal year 1987, 86 committees held no meetings; yet they incurred costs totaling about $535,000, about 78 percent of which was for federal staff compensation. Furthermore, 32 of these 86 committees did not hold any meetings during fiscal year 1986. These 32 committees incurred costs totaling about $83,000 that fiscal year.

The agencies recommended that all 86 of the advisory committees be continued in fiscal year 1988. GSA did not question the need for any of the 86 committees, and all were continued. Agencies provided GSA with explanations of why 60 of the 86 committees did not meet during fiscal year 1987. They reported that 28 of the 60 committees had not met because they were newly established. The reasons given by the agencies that the other 32 committees had not met were that

-- 16 had no agenda items to consider,

-- 5 had delays in appointing members,

-- 4 were in the process of reorganization,

-- 3 had no funding,

-- 2 had difficulties scheduling meetings, and

-- 2 had no chairpersons.

The agencies did not provide explanations why the remaining 26 committees did not meet. GSA did not request additional information to determine the reasons for no meetings during fiscal year 1987 or why the agencies believed the committees should be continued. Yet, GSA agreed with the agencies' recommendations to continue these committees.

While the agencies involved may have had valid explanations why the advisory committees had not met for up to 2 years, GSA did not determine why they were inactive or recommend that they should be abolished in accordance with FACA requirements.

GSA's Associate Administrator for Administration and the Secretariat Director cited various reasons for not having made the required comprehensive reviews. They said GSA did not have adequate information on advisory committee activities and that FACA responsibilities also suffered from several organizational changes over the years and from a lack of sustained management attention.

The officials said that limited staff capabilities caused GSA to selectively implement its FACA responsibilities. They believe that the Secretariat now has sufficient staff to carry out the comprehensive reviews and that as a first step, it is developing the information necessary to do so.

REPORTS TO CONGRESS

Under FACA, the President is required to report annually to Congress on the activities, status, and changes in the composition of advisory committees. The President or his delegate must also report to Congress the actions, or reasons for inaction, on recommendations of Presidential advisory committees within 1 year after the committees submit their reports. GSA is responsible for preparing both reports for the President. The annual reports have not been submitted by the due date, December 31, in recent years, and the follow-up reports have not been submitted since the early 1980s.

GSA submitted the fiscal year 1985 and 1986 reports to the President almost 10 months and 6 months, respectively, after they were due to Congress. The fiscal year 1987 report was submitted about 2 months after the due date. Moreover, the more recent reports have included less analysis of advisory committees' costs, meetings, and other activities than some earlier reports.

For example, the reports submitted for 1982, 1983, and 1984 identified committees with the highest total costs, member compensation costs, federal staff costs, travel costs, and consultant costs. The 1985 report had less cost analysis, and the 1986 and 1987 reports did not contain any of this information.

Similarly, earlier reports included analyses of advisory committee meetings. They identified agencies with committees holding no meetings, the costs associated with committees holding no meetings, and included a narrative of the reasons for no meetings. In the 1985, 1986, and 1987 reports, no mention was made of advisory committees that held no meetings.

According to GSA, follow-up reports have not been submitted since the early 1980s. Until that time, GSA had requested agencies that housed and/or provided staff support for Presidential committees to prepare the follow-up reports. GSA then sent the reports to OMB for review and submission to the Congress on behalf of the President.

The Secretariat Director told us that GSA does not have the expertise to determine the adequacy of proposals for action or reasons for inaction on recommendations made by Presidential advisory committees. He said that in his opinion, GSA should be responsible for making sure that such reports are prepared but that each agency must actually prepare the reports.

The Secretariat Director agreed that GSA has been remiss in seeing that agencies prepare the follow-up reports. He said that he plans to establish procedures whereby each committee's charter would identify the organization responsible for the reports.

CONCLUSIONS AND RECOMMENDATIONS

GSA has not accomplished its advisory committee responsibilities required by FACA. A number of factors have contributed to this circumstance, including insufficient management attention by GSA. GSA officials believe that they now have the staff resources necessary to carry out the FACA requirements.

To ensure that the Secretariat receives the management attention and support necessary, we recommend that the GSA Administrator develop a written plan for implementing the FACA responsibilities and specify the target dates for completing tasks and the resources to be applied. The plan should provide for reviewing advisory committees that have not met for extended periods and determining whether GSA should recommend, in line with FACA requirements, that the committees be abolished.

As requested by the Committee, we did not obtain official agency comments on this report. We did discuss the results of our review with the Associate Administrator for Administration and the Secretariat Director, and they agreed with our findings and conclusions.

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As arranged with the Committee, we are sending copies of this report to other interested parties and will make copies available to others upon request.

Sincerely yours,

Richard L Fogel

Richard L. Fogel
Assistant Comptroller General

DEPARTMENTS AND AGENCIES WITH 10 OR MORE ADVISORY COMMITTEES IN FISCAL YEAR 1987

Agency	Number
Health and Human Services	268
Interior	157
National Science Foundation[a]	72
Commerce	68
Defense	59
Commission on Civil Rights	51
Agriculture	48
Veterans Administration	34
Transportation	26
State	19
Labor	18
National Endownment for the Arts	15
Small Business Administration	15
Education	15
Energy	12
Environmental Protection Agency	12
United States Information Agency	12
National Aeronautics and Space Administration	11

[a] One committee, the Nuclear Science Advisory Committee, was transferred from the Department of Energy to NSF during FY 1987, and is counted only for the NSF total.

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10